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United States
1 1279
Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of the Petition of THE TERRI-
TORY OF HAWAII to Register and Con-
firm Its Title to the AHUPUAA OF
KIOLOKU, in the District of Kau, Island
and County of Hawaii, Territory of Hawaii.

THE TERRITORY OF HAWAII,

Appellant,

vs.

HUTCHINSON SUGAR PLANTATION COM-
PANY, Limited,

Appellee.


Transcript of Record.

Upon Appeal from the Supreme Court of the
Territory of Hawaii.

FILED

DEC 3 - 1920

F. D. MONKTON,
CLERK



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United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of the Petition of THE TERRITORY OF HAWAII to Register and Confirm Its Title to the AHUPUAA OF KIOLOKU, in the District of Kau, Island and County of Hawaii, Territory of Hawaii.

THE TERRITORY OF HAWAII,
Appellant,

vs.

HUTCHINSON SUGAR PLANTATION COMPANY, Limited,
Appellee.

Transcript of Record.

Upon Appeal from the Supreme Court of the Territory of Hawaii.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Supreme Court of the Territory of Hawaii.
LAND COURT PETITION No. 283.

In the Matter of the Petition of the **TERRITORY OF HAWAII** to Register and Confirm Its Title to the **AHUPUAA OF KIOLOKU** in the District of Kau, Island and County of Hawaii, Territory of Hawaii.

Application for Writ of Error.

To the Clerk of the Supreme Court.

Please issue a writ of error in the above-entitled case to the Registrar of the Land Court of the Territory of Hawaii, on behalf of said Territory of Hawaii, returnable to the Supreme Court.

Dated at Honolulu, T. H., July 26, 1919.

THE TERRITORY OF HAWAII,

Plaintiff in Error.

By **J. LIGHTFOOT,**

First Deputy Attorney General. [1*]

Service of a Copy of the Within Petition for Writ of Error this Day Admitted. Dated Honolulu, July 26, 1919. Robertson & Olson, Attorneys for Contestant, Defendant in Error. [2]

Issued for Service July 26, 1919, at 8:50 A. M.
J. A. Thompson, Clerk.

Returned July 26, 1919, at 9:43 A. M. **J. A. Thompson, Clerk.**

*Page-number appearing at foot of page of original certified Transcript of Record.

[Endorsed]: No. 1212. Supreme Court Territory of Hawaii. In the Matter of the Petition of the Territory of Hawaii to Register and Confirm its Title to the Ahupuaa of Kioloku in the District of Kau, Island and County of Hawaii, Territory of Hawaii. Rec'd & Filed in the Supreme Court, July 26, 1919, at 8:45 o'clock A. M. J. A. Thompson, Clerk.

In the Supreme Court of the Territory of Hawaii.

LAND COURT PETITION No. 283.

In The Matter of the Petition of the TERRITORY OF HAWAII to Register and Confirm Its Title to the AHUPUAA OF KIOLOKU in the District of Kau, Island and County of Hawaii, Territory of Hawaii.

Assignment of Errors.

Assignment No. 1.

The Court erred in receiving in evidence a letter of W. D. Alexander to the Minister of the Interior, Contestant's Exhibit No. 1. (Tr. p. 18).

Assignment No. 2.

The Court erred in receiving in evidence Land Commission Award No. 9659, to Kekahuna, Contestant's Exhibit No. 2. (Tr. p. 22.)

Assignment No. 3.

The Court erred in receiving in evidence Royal Patent No. 2656, to Kaiahua, Contestant's Exhibit No. 3. (Tr. p. 24).

Assignment No. 4.

The Court erred in receiving in evidence Royal Patent [3] No. 2748, to Kaleiku, Contestant's Exhibit No. 4. (Tr. p. 26).

Assignment No. 5.

The Court erred in receiving in evidence record of Boundary Commissioner, Volume A-1, page 399, referring to the boundaries of Kioloku, Contestant's Exhibit No. 5. (Tr. p. 29).

Assignment No. 6.

The Court erred in receiving in evidence Boundary Certificate No. 57, Contestant's Exhibit No. 6. (Tr. p. 30).

Assignment No. 7.

The Court erred in receiving in evidence Boundary Certificate No. 74, Contestant's Exhibit No. 7. (Tr. p. 31).

Assignment No. 8.

The Court erred in receiving Certificate of Boundaries No. 91, Contestant's Exhibit No. 8. (Tr. p. 33).

Assignment No. 9.

The Court erred in receiving in evidence Partition Deed, dated July 3, 1870, Contestant's Exhibit No. 12. (Tr. p. 95).

Assignment No. 10.

The Court erred in refusing to receive in evidence a certain document, being a list of unassigned lands, produced [4] from the custody of the Board of Archives of the Territory of Hawaii, and endorsed as Exhibit "D" in the case of *Thurston v. Bishop*, dated May 1, 1888, said exhibit being marked for

identification as Territory's Exhibit — for identification. (Tr. p. 131).

Assignment No. 11.

The Court erred in refusing to receive in evidence a document produced from the Archives of the Territory purporting to be an exhibit in the said case of *Thurston v. Bishop*, giving a list and estimated areas of unassigned lands, including Kioloku, which document was marked Territory's Exhibit — for identification. (Tr. p. 134).

Assignment No. 12.

The Court erred in holding and deciding as follows:

“There remains the possibility, therefore, that evidence of an award of Kioloku to Keohokalole actually exists in the records of the Land Commission.” (Decision, p. 3.)

Assignment No. 13.

The Court erred in holding and deciding as follows:

“The evidence adduced also discloses a number of corroborating circumstances of more or less cogency tending to support the contention of the claimant. In this connection it is deemed pertinent to observe that as early as 1852 Kioloku seems to have been generally known as ‘konohiki’ land, that is to say, privately owned land. Tending to show this there are old maps and surveys, and a description of a kuleana within the boundaries of Kioloku, and surveys and descriptions of other lands adjoining this ahupuaa, whereby Kioloku was referred to as konohiki,’ and not as ‘unassigned’ or ‘Government’ land, which, as contradistinguished from

‘konohiki’, would have been properly designated [5] by the term ordinarily used with reference to such land, namely, ‘Aupuni.’” (Decision, pp. 4 and 5).

Assignment No. 14.

The Court erred in holding and deciding as follows:

“The record of the Boundary Commissioner for the Third Judicial Circuit (R. A. Lyman) shows a proceeding, brought in 1873, under the statute for the settlement of the boundaries of lands which had been awarded by their ancient Hawaiian names, without surveyed descriptions. That proceeding was had upon the application of David Kalakaua (who claimed title through the above-mentioned partition deed) for the settlement and adjudication of the boundaries of the Ahupuaa of Kioloku. The record shows that the owners of the adjoining lands had been notified of the proceeding as required by law. In response to the notice, as appears by the Commissioner’s record, His Majesty King Lunalilo (owner of the adjoining Ahupuaa of Honuapo) represented by J. G. Hoapili, and the Government (owner of the adjoining Ahupuaa of Kaunamano) represented by W. T. Martin, appeared. The hearing proceeded, testimony was taken and a judgment defining the boundaries of the land by a surveyed description was entered. (Boundary Certificate No. 57). The respective owners of the adjoining lands of Honuapo and Kaunamano had a right to be heard lest their

lands should be encroached upon by the judgment which would be entered defining the boundaries of Kioloku. No objection having been made by either of them to the hearing of the application of Kalakaua it would seem that it amounted to an admission on the part of the King (Lunalilo), as the owner of Honuapo, and of the Government, as the owner of Kaunamano, that Kalakaua had the right to maintain the proceeding as the owner of Kioloku. This piece of evidence, as I view it, is important and of much probative force, for the reason that all the parties concerned, the Commissioner, the King, the Government's representative, as well as Kalakaua, were in a position to know the exact status of Kioloku and the precise nature of Kalakaua's title. (Decision, pp. 5 and 6.)

Assignment No. 15.

The Court erred in holding and deciding as follows:

[6]

“The petitioner places great reliance upon the statement by Kalakaua in his application of June 23, 1873, to the effect that no award had been issued to his mother, Ane Keohokalole. However, the conduct and all the acts of all the persons who have ever had anything to do with Kioloku (except as to this one statement made by Kalakaua), including the various Governments of these Islands, throughout the entire history of Kioloku, down to the filing of the petition herein, were and are inconsistent with the alleged ownership of the petitioner, and consistent with

the alleged ownership of the claimant. In this respect the petitioner, at most, can claim but one fact as against a long chain of other facts in evidence which supports the undisturbed and long continued possession of Keohokalole and her successors in interest, which, to my mind, strongly tend to show that Kioloku was privately owned. If Kalakaua was not the owner of Kioloku, why did the Boundary Commissioner, with the acquiescence of the Government, recognize him as the owner, and settle the boundaries of the land upon his application? Why was Kalakaua's application favorably acted upon only as to Kioloku if, as a matter of fact, it belonged no more to him than did the other lands named in his application? There must be some reason or explanation for the distinction made between Kioloku and the other lands. There are, apparently two theories, either of which is reasonable. One is, that Kalakaua was mistaken, and the surveyors and Government officials, who evidently believed that Keohokalole had acquired title, were right. This would satisfactorily account for the fact that Kalakaua was given a certificate of boundaries for the land, and the further fact that the land has ever since been regarded, treated and taxed as private property. The other theory upon which a solution of the matter may be had is, that upon the filing by Kalakaua of his application an arrangement or settlement by way of compromise was entered into between him and the Govern-

ment whereby his title to Kioloku would be recognized and confirmed in consideration of his withdrawing or not pressing his application as to the other lands named, direct evidence of which arrangement or settlement cannot now be found.” (Decision, pp. 9 and 10).

Assignment No. 16.

The Court erred in holding and deciding as follows:

“Upon this phase of the case it would seem that the doctrine of presumptions, which permeates the remedial side of our system of [7] jurisprudence, may appropriately be invoked. This doctrine applies to contracts, settlements, or compromises, as well as to the issuance of grants of lands and other muniments of title, when the circumstances involved (there being no direct evidence of the fact) affords a natural, reasonable and logical explanation of the state of facts shown in evidence and leading to a proper and just conclusion.” (Decision, p. 10).

Assignment No. 17.

The Court erred in holding and deciding as follows:

“Upon the question as to whether there must be proof that the award or grant was actually made, the opinion of the court in *Fletcher v. Fuller* (120 U. S. 534, 30 L. Ed. 759), referred to in the *Chavez* case, *supra*, at page 259 (L. Ed.) is as follows, and makes it clear that such proof is not required.” (Decision, p. 12).

Assignment No. 18.

The Court erred in holding and deciding as follows:

“As to payment of taxes. The payment of

taxes on land is evidence of a claim of title by one in possession in cases between individuals.

O. R. & L. Co. v. Kaili, 22 Haw. 673, 678;
Holtzman v. Douglas, 120 U. S. 278, 284 (42
L. Ed. 466, 468).

“Such payment is also potent evidence against the Government which has levied and collected taxes upon land, as it practically amounts to an admission of title in the party who has paid the taxes.” (Decision, p. 13).

Assignment No. 19.

The Court erred in holding and deciding as follows:

“Where taxes have been collected upon land for a long period of time by the former Government of the country it is no proper function of a new Government to attempt to disturb the [8] possession and uproot the title of the party from whom taxes have been collected, and other facts and circumstances indicate strongly that title was obtained from the Government, merely because evidence of the original award which might have been issued over sixty years before the title was questioned, cannot be found.” (Decision, p. 14).

Assignment No. 20.

The Court erred in holding and deciding as follows:

“The petitioner contends that ‘it is clearly proven that no grant was ever made of the land in question; that it therefore falls within the category of unassigned lands, and, under the authority of *Thurston v. Bishop*, 7 Haw. 421, remains the property of the Government not-

withstanding any claim of title by reason of long continuous occupation of the land by the plantation.'

"As I view the case of *Thurston v. Bishop*, the only point it decided was that the statute of limitations does not run against the state. The claimant does not rest its case upon the statute of limitations, but upon the presumption of a grant." (Decision, p. 14).

Assignment No. 21.

The Court erred in holding and deciding as follows:

"There is a very clear distinction between the application of the doctrine of the statute of limitations and that of the presumption of a grant. The former does not operate against the sovereign, while the latter does. The presumption of a grant exists independently of the statute of limitations." (Decision, pp. 14 and 15).

Assignment No. 22.

The Court erred in holding and deciding as follows:

"In conclusion, after a careful consideration of all the evidence herein, and the law applicable thereto, I find that the Territory of Hawaii, the petitioner herein, has no right, title, or interest whatsoever in or to the Ahupuaa of Kioloku, the land in question, and, therefore, has no right to have the same registered." (Decision, p. 17).

[9]

Assignment No. 23.

The Court erred in dismissing the petition herein. (Decision, p. 17).

Assignment No. 24.

The Court erred in entering a decree finding that the petitioner has no right, title or interest whatsoever in or to the Ahupuaa of Kioloku, the land in question.

Assignment No. 25.

The Court erred in entering a decree dismissing the petition herein.

All pleadings, files, exhibits, transcript of the testimony taken, and the Clerk's Minutes of the proceedings had herein are hereby referred to and made a part of this Assignment of Errors.

Dated, Honolulu, T. H., July 26, 1919.

THE TERRITORY OF HAWAII,

Plaintiff in Error,

By J. LIGHTFOOT,

First Deputy Attorney General. [10]

Service of a copy of the within Assignment of Errors this day admitted. Dated Honolulu, July 26, 1919..

ROBERTSON & OLSON,

Attorneys for Defendant in Error. [11]

Issued for service July 26, 1919, at 8:50 A. M.
J. A. Thompson, Clerk.

Returned July 26, 1919, at 9:43 A. M.. J. A.
Thompson, Clerk.

[Endorsed]: No. 1212. Supreme Court Territory of Hawaii. In the Matter of the Petition of the Territory of Hawaii to Register and Confirm its Title to the Ahupuaa of Kioloku in the District of Kau, Island and County of Hawaii, Territory of Hawaii. Assignment of Errors. Rec'd & Filed in the Su-

preme Court July 26, 1919, at 8:45 o'clock A. M.
J. A. Thompson, Clerk.

In the Supreme Court of the Territory of Hawaii.

LAND COURT PETITION No. 283.

In the Matter of the Petition of the TERRITORY
OF HAWAII to Register and Confirm Its
Title to the AHUPUAA OF KIOLOKU in
the District of Kau, Island and County of
Hawaii, Territory of Hawaii.

Notice of Application for Writ of Error.

To the Hutchinson Sugar Plantation Company, and
to Messrs. Robertson & Olson, its Attorneys;

Please take notice that application has this day
been made for a writ of error from the Supreme
Court of the Territory of Hawaii to the Land
Court of the Territory of Hawaii.

Please also find attached hereto copy of assign-
ment of errors in said case.

Dated Honolulu, T. H., July 26, 1919.

THE TERRITORY OF HAWAII,

Plaintiff in Error.

By J. LIGHTFOOT,

First Deputy Attorney General. [12]

Service of a copy of the within Notice of Appli-
cation for Writ of Error this day admitted.

Dated Honolulu, July 26, 1919.

ROBERTSON & OLSON,

Attorneys for Defendant in Error. [13]

Issued for service July 26, 1919, at 8:50 A. M.

J. A. THOMPSON,
Clerk.

Returned July 26, 1919, at 9:43 A. M.

J. A. THOMPSON,
Clerk.

[Endorsed]: No. 1212. Supreme Court Territory of Hawaii. In the Matter of the Petition of the Territory of Hawaii to Register and Confirm Its Title to the Ahupuaa of Kioloku in the District of Kau, Island and County of Hawaii, Territory of Hawaii. Notice of Application for Writ of Error. Rec'd & Filed in the Supreme Court July 26, 1919, at 8:45 o'clock A. M. J. A. Thompson, Clerk.

In the Supreme Court of the Territory of Hawaii.

LAND COURT PETITION No. 283.

In the Matter of the Petition of the TERRITORY OF HAWAII to Register and Confirm Its Title to the AHUPUAA OF KIOLOKU in the District of Kau, Island and County of Hawaii, Territory of Hawaii.

Writ of Error.

To the Registrar of the Land Court, of the Territory of Hawaii:

Application having been made on behalf of said Territory of Hawaii, for a writ of error in the above-entitled case, you are commanded forthwith to send to the Supreme Court the record in said case.

WITNESS the Honorable James L. Coke, Chief Justice of the Supreme Court, this 26th day of July, 1919.

[Seal]

J. A. THOMPSON,

Clerk of the Supreme Court.

Received the foregoing writ of error on this 26th day of July, 1919, at 9:15 o'clock A. M.

ARTHUR E. RESTARICK,

Registrar of the Land Court.

To the clerk of the Supreme Court:

The execution of the within writ of error appears by the record hereto annexed.

Honolulu, August. 14, 1919.

ARTHUR E. RESTARICK,

Registrar of the Land Court. [14]

Service of a copy of the within Writ of Error this day admitted.

Dated Honolulu, July 26, 1919.

Attorneys for Defendant in Error. [15]

Returned August 14, 1919, at 2:00 P. M.

J. A. THOMPSON,

Clerk.

[Endorsed]: No. 1212. Supreme Court Territory of Hawaii. In the Matter of the Petition of the Territory of Hawaii to Register and Confirm Its Title to the Ahupuaa of Kioloku in the District of Kau, Island and County of Hawaii, Territory of Hawaii. Filed and Issued July 26, 1919, at 8:45 A. M.

J. A. THOMPSON,

Clerk.

In the Land Court of the Territory of Hawaii.

PETITION NO. 283.

In the Matter of the Petition of the TERRITORY OF HAWAII to Register and Confirm Its Title to the AHUPUAA OF KIOLOKU, in the District of Kau, Island and County of Hawaii, Territory of Hawaii.

Petition for Registration of Title.

To the Honorable William L. Whitney, Judge of the Land Court of the Territory of Hawaii.

The Territory of Hawaii, by its Commissioner of Public Lands, hereby applies to have the land hereinafter described brought under the operation and provisions of Chapter 154 of the Revised Laws of Hawaii as amended, and to have its title thereto registered and confirmed, and the said Commissioner of Public Lands, by his Attorney, Arthur G. Smith, Deputy Attorney General, declares:

I.

That the Territory of Hawaii has the power of disposition of the legal estate in fee simple absolute of the Ahupuaa of Kioloku, situate in the District of Kau, Island and County of Hawaii, Territory of Hawaii, and more particularly described as follows:—[16]

Beginning at a "W" on rock on a small knoll in Fern, the true azimuth and distance to "Kala" Trig. Station being 1° 30' 263.0 feet and from this Station the true azimuth and distance to Government survey Trig. Station "Kapuna" is 15° 23'

6439.0 feet, and running by true azimuths:

1. $135^{\circ} 10'$ 2712.0 feet along the land of Kaunamano;

2. $140^{\circ} 23'$ 1927.0 feet along the land of Kaunamano;

3. $141^{\circ} 23'$ 1954.0 feet along the land of Kaunamano;

4. $139^{\circ} 45'$ 2065.0 feet along the land of Kaunamano;

5. $188^{\circ} 53'$ 79.0 feet to a place called Napumaia;

6. $230^{\circ} 00'$ 1848.0 feet along the land of Kaalailki;

7. $335^{\circ} 20'$ 2317.0 feet along the land of Kaalailki;

8. Thence along the middle of a stream along the land of Kaalailki; the direct azimuth and distance being:— $309^{\circ} 10'$ 2785.0 feet;

9. Thence still along the middle of the stream along the land of Kaalailki, the direct azimuth and distance being:— $279^{\circ} 06'$ 1242.0 feet; from this point the true azimuth and distance to a Forest Reserve Monument is $239^{\circ} 00'$ 35.0 feet;

10. $328^{\circ} 00'$ 2370.0 feet along the land of Honuapo to a "W" marked in bed-rock of gulch at a place called Kamakaili, about 15 feet north of a waterhole;

11. $352^{\circ} 20'$ 575.0 feet along the land of Honuapo to a "+" on set stone in fern;

12. $315^{\circ} 02'$ 1924.0 feet along the land of Honuapo to a "+" on set stone;

13. $310^{\circ} 50'$ 1744.0 feet along the land of Honuapo to a "D" on large solid stone at a place called

Kuapapa; from this point the true azimuth and distance to Government Survey Trig. Station "Kumuohelo" is $218^{\circ} 12'$ 4963.5 feet; [17]

14. $299^{\circ} 25'$ 1484.0 feet along the land of Honuapo;

15. $313^{\circ} 05'$ 244.0 feet along the land of Honuapo;

16. $295^{\circ} 30'$ 1304.0 feet along the land of Honuapo to a "W" on set stone by stone wall; from this point the true azimuth and distance to "Maakau" Trig. Station is $209^{\circ} 20'$ 45.0 feet and from said station the true azimuth and distance to Government Survey Trig. Station "Kumuohelo" is $184^{\circ} 30'$ 5324.8 feet;

17. $297^{\circ} 23'$ 3007.0 feet along the land of Honuapo;

18. $297^{\circ} 38'$ 1220.0 feet along the land of Honuapo;

19. $298^{\circ} 00'$ 1275.0 feet along the land of Honuapo;

20. $5^{\circ} 05'$ 348.0 feet along L. C. A. 9659 to Kekahuna;

21. $304^{\circ} 50'$ 828.0 feet along L. C. A. 9659 to Kekahuna;

22. $205^{\circ} 35'$ 429.0 feet along L. C. A. 9659 to Kekahuna to a pipe;

23. $277^{\circ} 00'$ 2660.0 feet along the land of Honuapo to a "W" cut in pahoehoe;

24. $277^{\circ} 00'$ 127.0 feet along the land of Honuapo to Pohakau Point; at the sea;

25. Thence along the sea coast, the direct azimuth and distance being $45^{\circ} 45'$ 1870.0 feet;

26. 108° 05' 133.0 feet up Pohina Bluff along Grant 2656 to Kaiahua to a + on set stone in wall;

27. 108° 05' 540.0 feet along Grant 2656 to Kaiahua;

28. 108° 05' 1404.0 feet along Grant 2748 to Kaleikau;

29. 116° 50' 500.0 feet along L. C. A. 9660 to Kaahui and Lot 29 of the Kaunamano Homesteads;

30. 113° 15' 551.0 feet along Lot 29 of the Kaunamano Homesteads;

31. 109° 15' 1280.0 feet along Lot 27A of the Kaunamano Homesteads; [18]

32. 114° 38' 1535.0 feet along Lot 27A of the Kaunamano Homesteads;

33. 118° 11' 2013.0 feet along Lots 27A, 24, and 20 of the Kaunamano Homesteads;

34. 121° 22' 2266.0 feet along Lots 20 and 19 of the Kaunamano Homesteads;

35. 125° 15' 5605.0 feet along Lot 16 of the Kaunamano Homesteads and the land of Kaunamano to the point of beginning, area 850 acres.

II.

That he does not know of any mortgage or other incumbrance affecting said land or that any other person has any estate or interest therein, legal or equitable, in possession, remainder, reversion or expectancy; but the attention of the court is respectfully called to the fact that on July 1, 1870, a partition deed was made between Lydia K. Dominis and her husband, John O. Dominis, L. M. Kapaakea, David Kalakaua and his wife Kapiolani, and Ruth Keelikolani, as Guardian of W. P. Kalahoolewa,

whereby it appears that Lydia K. Dominis, Like-like, who was also known under the name of L. M. Kapaakea, David Kalakaua and W. P. Kalahoolewa, were the children of C. Kapaakea and Annie Keohokalole, and as such were heirs at law of Annie Keohokalole, deceased, and entitled thereby to certain property in the Hawaiian Islands, among which was claimed the land of Kioloku. That under and by the said partition, the land of Kioloku was set aside to David Kalakaua, who on December 15, 1873, conveyed it to Obadiah B. Spencer; and that the Hutchinson Sugar Plantation Company, a corporation organized and existing under the laws of the State of California, now claims to be the owner of said [19] property by mesne conveyances from said Obadiah B. Spencer.

III.

That the said lands have never been awarded or patented or granted to any person or persons and are now and at all times heretofore have been "unassigned lands," of which the Territory of Hawaii has the legal power of disposing of the legal estate in fee simple.

IV.

That the said land is now occupied by the following named corporation: Hutchinson Sugar Plantation Company, a California corporation, whose attorney for service of process is E. Faxon Bishop, Honolulu, Territory of Hawaii.

V.

That the names in full and addresses so far as known to the undersigned of the occupants and

owners of land adjoining said land are as follows:

Anna Kailiawa, Homestead Lot No. 19, Kaunamano, Kau, Hawaii;

Eliza Gibson, Homestead Lot No. 20, Kaunamano, Kau, Hawaii;

E. K. Kauwe, Homestead Lot No. 24, Kaunamano, Kau, Hawaii;

Hutchinson Sugar Plantation Company, Naalehu, Kau, Hawaii.

VI.

That the Territory of Hawaii claims to own in fee simple the land within the limits of the Kealakamano Road and the Kealaiki Road and all other roads which cross said land.

Dated at Honolulu this 1st day of August, 1913.
[20]

THE TERRITORY OF HAWAII,
By J. D. TUCKER,
Commissioner of Public Lands,
(Signed) By ARTHUR G. SMITH,
Deputy Attorney General.

Territory of Hawaii,
City and County of Honolulu—ss.

ARTHUR G. SMITH, being first duly sworn, deposes and says: That he is a duly appointed, qualified and acting Deputy Attorney General of the Territory of Hawaii; that he has read the foregoing Petition by him subscribed, knows the contents thereof and that the same is true to the best of his knowledge and belief.

(Signed) ARTHUR G. SMITH.

Subscribed and sworn to before me this first day of August, 1913.

[Seal] (Signed) SAMUEL UPA,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

[Endorsed]: In the Court of Land Registration, Territory of Hawaii. Petition No. 283. In the Matter of the Petition of the Territory of Hawaii to Register and Confirm Its Title to the Ahupuaa of Kioloku, in the District of Kau, Island and County of Hawaii, Territory of Hawaii. Petition for Registration. Filed August 2, 1913, at 9:10 o'clock A. M. (S) A. M. Harrison, Registrar. Arthur G. Smith, Deputy Attorney General, Attorney for the Territory. [21]

In the Court of Land Registration of the Territory
of Hawaii.

No. 283.

In the Matter of the Petition of the TERRITORY
OF HAWAII, to Register and Confirm Title
to Land.

**Answer and Claim of Hutchinson Sugar Plantation
Company.**

Comes now Hutchinson Sugar Plantation Company, a California corporation, and answering unto the petition presented to the above-entitled Court in the above-entitled cause by the Territory of Hawaii, as petitioner, to register and confirm its

alleged title to the land described in said petition, say:

That the said petitioner has no title or right or interest in the land described in said petition or any part thereof;

That the said Hutchinson Sugar Plantation Company is seized and is the owner in fee simple of all of the land described in said petition.

WHEREFORE: Said Hutchinson Sugar Plantation Company prays that the prayer of the said petition be denied and the said petition be dismissed and that it may be adjudged to have its costs suffered herein.

Dated, Honolulu, T. H. December 5th, 1913.

[Seal] HUTCHINSON SUGAR PLANTATION COMPANY,

By HOLMES, STANLEY & OLSON,

Its Attorneys. [22]

Territory of Hawaii,

City and County of Honolulu.—ss.

E. F. BISHOP, being first duly sworn, deposes and says:

That he is the attorney in fact of Hutchinson Sugar Plantation Company, the corporation named in the foregoing answer and claim, and as such is authorized to make and makes this verification; that he has read the said answer and claim and knows the contents thereof and that the same are true to the best of his knowledge, information and belief.

(Signed) E. F. BISHOP.

Subscribed and sworn to before me this 6th day of December, 1913.

[Notarial Seal]

(Signed) CARL C. RHODES,
Notary Public First Judicial Circuit, Territory of Hawaii.

Received a copy of the foregoing this 6th day of December, 1913.

(S) ARTHUR G. SMITH,
Dep. Atty. Gen. Territory of Hawaii.

[Endorsed]: No. 283. In the Court of Land Registration of the Territory of Hawaii. In the Matter of the Petition of the Territory of Hawaii, to Register and Confirm Title to Land. Answer and Claim of Hutchinson Sugar Plantation Co. Filed Dec. 5th, 1913, at 10 A. M. J. Marcallino, Registrar. [23]

In the Land Court of the Territory of Hawaii.

PETITION No. 283.

In the Matter of the Petition of the TERRITORY OF HAWAII to Register and Confirm Its Title to the AHUPUAA OF KIOLOKU, in the District of Kau, Island and County of Hawaii, Territory of Hawaii.

Motion for Leave to Reopen Case for the Purpose of Offering Further Evidence in the Petition of the Territory.

Now comes the Territory of Hawaii, petitioner above named, by J. Lightfoot, Deputy Attorney

General, and moved this Honorable Court for an order herein allowing the introduction in evidence on behalf of the Territory by way of rebuttal, of a certified copy of portion of page 220, Volume 1-A, "Records of the Commissioner of Boundaries," the same being the petition of David Kalakaua for a certificate of boundaries of several lands including the land in question, said petition being in the Hawaiian language, a copy of which is as follows: "I ka mea Hanohano Rufus A. Lyman,

Luna Palena Aina Oka,
Mokupuni o Hawaii.

Oka mea nona ka inoa malalo ke hoike nei he mau aina ko A. KEOHOKALOLE 'Aole' i loona na Award o ke kahi o kona mau aina 'mai na Luna Hoona mai' aka; ua mu no kona noho kuleana ana maluna oia mau Ahupuaa a hiki wale i keia wa; Nolaila ke nonoi ia aku nai e hooponopono ia na [24] palena o ua mau aina, e like me ko lakou mau inoa malolo panai:

1. Ahupuaa.	Kalana.	Mokupuni.
1. Lililoa.	Puna.	Hawaii.
2. Nalua.	Kau.	"
3. Kamakamaka.	"	"
4. Kapauku. 5.	"	"
5. Mohokea.	"	"
6. Kioloku.	"	"
7. Ilikahi.	Kona.	"

E kauoha ia no hoi ka Poe pili i keia mau aina e hele ae i ku-la, i hoolala ia i e hana ia keia mau aina imua oke Komokina aina.

Mea Noi.

(Sig.) D. KALAKAUA.

Honolulu, June 23d, 1873."

And a translation of which is as follows:

"To the Honorable Rufus A. Lyman,
Commissioner of Boundaries,
Island of Hawaii.

The Undersigned states, that A. KEO-HOKALOLE had dands. She did not receive awards from the Lands Commission to some of her lands; but she still holds said Ahupuaas to this time, Therefore, herewith apply to settle the boundaries of said lands, according to their names hereinunder, thus,

Ahupuaas.	District.	Island.
1. Lililoa.	Puna.	Hawaii.
2. Nalua.	Kau.	"
3. Kamakamaka.	"	"
4. Kapauku. 5.	"	"
5. Mohokea.	"	"
6. Kioloku.	"	"
7. Ilikahi.	Kona.	"

Property owners adjoining these lands be also called to appear on the day set for action on these lands, before the Land Commission,

Applicant,

Sgd. D. KALAKAUA,

Honolulu, June 23d, 1873." [25]

This motion is based on the record in said cause and on the affidavit of J. Lightfoot, hereto attached and made a part hereof, and to which reference is hereby made.

Dated, Honolulu, December 12th, A. D. 1918.

THE TERRITORY OF HAWAII,

(Signed) By J LIGHTFOOT,
Deputy Attorney General. [26]

In the Land Court of the Territory of Hawaii.

PETITION No. 283.

In the Matter of the Petition of the TERRITORY
OF HAWAII to Register and Confirm Its
Title to the AHUPUAA OF KIOLOKU, in
the District of Kau, Island and County of
Hawaii, Territory of Hawaii.

Notice of Motion.

To Hutchinson Sugar Plantation Company, and to
A. G. M. Robertson, Esquire, Its Attorney:

Please take notice that the foregoing motion will
be presented before the Honorable J. T. De Bolt,
Judge of the Land Court of the Territory of
Hawaii, at his courtroom in the Judiciary Building,
Honolulu, on the 14th day of December, 1918, at
the hour of nine o'clock in the forenoon of said
day, or as soon thereafter as counsel can be heard.

Dated, Honolulu, December 12th, A. D. 1918.

THE TERRITORY OF HAWAII,

(Signed) By J. LIGHTFOOT,
Deputy Attorney General.

Filed Dec. 12/18. A. V. Hogan, Registrar. [27]

In the Land Court of the Territory of Hawaii.

PETITION No. 283.

In the Matter of the Petition of the TERRITORY OF HAWAII to Register and Confirm Its Title to the AHUPUAA OF KIOLOKU, in the District of Kau, Island and County of Hawaii, Territory of Hawaii.

Affidavit of J. Lightfoot.

City and County of Honolulu,
Territory of Hawaii,—ss.

Now comes J. Lightfoot, and being first duly sworn, on oath deposes and says:

That he is First Deputy Attorney General of the Territory of Hawaii; that he presented the cause of the petitioner in the Land Court before the Honorable J. T. De Bolt on the 26th day of October, 1918; that on said day the attorney for the contestant offered in evidence pages 98 and 399 of Volume 1-A, *Record of Boundary Commissions*, the same referring to the evidence of witnesses and the decision of the Boundary Commissioner in relation to the boundaries of the Ahupuaa of Kioloku;

Filed Dec. 12/18. A. V. Hogan, Registrar. [28]

That through inadvertence and mistake, affiant did not offer in evidence the position of the record in the said matter contained on page 220, Volume 1-A of said record, the same being the petition of David Kalakaua for a certificate of boundaries of the land of Kioloku; that affiant believes said evi-

dence to be of importance in the case above and material to the issues joined therein.

Dated, Honolulu, December 12th, A. D. 1918.

(Signed) J. LIGHTFOOT,

Subscribed and sworn to before me this 12th day of December, A. D. 1918.

[Seal] (Signed) EVELYN M. SCOTT,
Notary Public, First Judicial Circuit, Territory of
Hawaii. [29]

In the Land Court of the Territory of Hawaii.

PETITION No. 283.

In the Matter of the Petition of the TERRITORY
OF HAWAII to Register and Confirm Its
Title to the AHUPUAA OF KIOLOKU, in
the District of Kau, Island and County of
Hawaii, Territory of Hawaii.

Stipulation as to Agreed Facts.

ROBERTSON & OLSON,
863 Kaahumanu Street, Honolulu,
Attorneys for HUTCHINSON SUGAR PLANTA-
TION COMPANY, Claimant.

Filed Dec. 28/18. A. V. Hogan, Registrar. [30]

In the Land Court of the Territory of Hawaii.

PETITION No. 283.

In the Matter of the Petition of the TERRITORY OF HAWAII to Register and Confirm Its Title to the AHUPUAA OF KIOLOKU, in the District of Kau, Island and County of Hawaii, Territory of Hawaii.

Stipulation as to Agreed Facts.

The following facts relating to the lands mentioned in the application of D. Kalakaua to the Boundary Commissioner of the Island of Hawaii, dated June 23d, 1873, other than the land of Kioloku, are for the purposes of this cause agreed upon by the parties hereto, and it is stipulated and agreed by said parties that said facts shall be considered by the Court in the determination of this cause with the same effect as though they had been testified to by witnesses:

(1) LILILOA, PUNA, HAWAII. This land is also called ILIILILOA. No hearing was had or taken by the commissioner of boundaries with respect to this land upon the application of D. Kalakaua, or otherwise. In 1896, it was sold and conveyed by the Government to John T. Baker, by Grant No. 3954.

(2) NALUA, KAU, HAWAII, This is an ili within the Ahupuaa of Kaunamano. No hearing was had or action taken by the Commissioner of Boundaries with respect [31] to this land upon the application of D. Kalakaua, or otherwise. A

portion of it containing an area of 52.50 acres was sold and conveyed by the Government in 1856 to Keauwemaka by grant No. 2118. The remainder was homesteaded by the Government in 1913, and sold and conveyed to various parties by various grants.

(3) KAMAKAMAKA, KAU, HAWAII. No hearing was had or action taken by the commissioner of boundaries with respect to this land upon the application of D. Kalakaua, or otherwise. No land in the district of Kau is at the present time known by this name, nor is there any map or other record in the Government survey office by which it can be identified.

(4) KAPAUKU 5, KAU, HAWAII. This land is now known by the name of Paukunui, and is an ili within the Ahupuaa of Kaunamano. No hearing was had or action taken by the commissioner of boundaries with respect to this land upon the application of D. Kalakaua, or otherwise. A portion of this land containing an area of 205.50 acres was sold and conveyed by the Government in 1859 to Kalakuniai by grant No. 2653. Other portions were homesteaded by the Government in 1913, and sold and conveyed to various parties by various grants.

(5) MOHAKEA, KAU, HAWAII. This land was also known as Mohokea. No hearing was had or action taken by the commissioner of boundaries with respect to this land on the application of D. Kalakaua. Its boundaries were settled and adjudicated by the commissioner of boundaries in two

parcels in and by Boundary Certificates Nos. 93 and [32] 94, issued on June 14th, 1876, to Princess Ruth Keelikolani, upon her application. This land, together with other lands claimed by the Princess formed the basis for a compromise with the Government whereby the trustees of the Estate of B. P. Bishop, successors in interest to Princess Ruth, relinquished all claim to certain lands designated as unassigned lands in consideration of the issuance of patents for three of them, which said compromise was ratified by the legislature of the Hawaiian Kingdom by chapter 78 of the Laws of 1890.

(6) ILIKAHI, SOUTH KONA, HAWAII. No hearing was had or action taken by the commissioner of boundaries with respect to this land upon the application of D. Kalakaua or otherwise. The land was sold and conveyed by the Government in several parcels to various parties in 1852 and 1853 by grants numbered 866, 927, 1145, 1174 and 1175.

(7) That no Land Commission Award covering any of the said lands can be found in the records of the Land Commission or other public records.

Dated, Honolulu, December 27th, 1918.

TERRITORY OF HAWAII.

(Signed) By J. LIGHTFOOT,
Deputy Attorney General.

HUTCHINSON SUGAR PLANTATION
COMPANY.

(Signed) By ROBERTSON & OLSON,
Its Attorneys. [33]

Land Court, Territory of Hawaii.

PETITION No. 283.

In the Matter of the Petition of the TERRITORY
OF HAWAII.

Decision. Filed, January 29, 1919. (S.) A. V.
Hogan, Registrar, Land Court. [34]

Land Court, Territory of Hawaii.

PETITION No. 283.

In the Matter of the Petition of the TERRITORY
OF HAWAII.

Decision of Hon. John T. De Bolt.

On August 2, 1913, the Territory of Hawaii, the petitioner herein, filed its petition for the purpose of having that certain tract of land, containing an area of 850 acres, known as the Ahupuaa of Kio-loku, District of Kau, Island of Hawaii, brought under the operation and provisions of the Land Registration Act (now chapter 178 of the Revised Laws of Hawaii, 1915), and to have its alleged title thereto registered and confirmed.

The petition recites, *inter alia*, that the land has never been awarded, patented or granted to any person or persons, and that the petitioner claims title thereto as an "unassigned" land, that is to say, a land which is not mentioned in the record of the Great Mahele of 1848, whereby all the lands of the Hawaiian Kingdom were intended, or sup-

posed, to have been assigned and set apart in severalty to and between the King, the Chiefs, and the Government, respectively. The contention of the petitioner being that all tracts of land not expressly listed as having been set apart to a chief, and subsequently awarded to him by an award of the Land Commission, which was exercising its functions under the Act of 1845, became the property of the Government. [35]

The Hutchinson Sugar Plantation Company, a California corporation, as claimant herein, filed its answer to the petition, wherein it says that the petitioner "has no title or right or interest in the land described in said petition or any part thereof"; that the claimant "is seized and is the owner in fee simple of all the land described in said petition."

The claimant asserts title under a Mahele and Land Commission Award which, under the circumstances disclosed by the evidence herein, must, as counsel for the claimant contends, be presumed to have been made to the High Chiefess Ane Keohokalole, but thereafter lost, and cannot now be found.

As to the evidence adduced at the hearing, there is but little, if any conflict. The chief contention of counsel on behalf of the respective parties being confined almost entirely to the necessary or proper conclusion to be drawn from the facts and circumstances disclosed by the evidence and admissions submitted for the consideration of the Court.

The evidence of the petitioner on its case in chief consisted of the testimony of S. M. Kanakanui, who has been thirty years in the service of the Bureau of

Government Survey. He testified to having searched the records of the Land Commission and the Privy Council of the former Hawaiian Kingdom without finding any record of or reference to the land of Kioloku. He found records of a Mahele and Land Commission Awards of other lands to Ane Keohokalole and her husband, the Chief, C. Kapaakea, but none of the land in question.

He also testified that the Ahupuaa of Kioloku was not mentioned in the Mahele records, and, later, the record of Keohokalole's Mahele being introduced in evidence, it confirmed his statement in this regard. He also testified to having made a [36] very careful search of the records of the Privy Council; but those records are of secondary importance, compared with those of the Land Commission, for it would be in the latter, and not in the former, that evidence of an award would naturally be found. The search made by the witness of the records of the Land Commission was not, as he said, "page by page," as in the case of the Privy Council records, and he admitted that in making the search he was working on Government titles in general, and not looking for Kioloku specially. There remains the possibility, therefore, that evidence of an award to Kioliku to Keohokalole actually exists in the records of the Land Commission

The witness further testified that he searched for, without finding, a Royal Patent or Grant covering Kioloku.

The case for the claimant consists partly of facts

admitted by the petitioner and partly of evidence which is practically undisputed. The claim asserted by the claimant rests upon the long continued and uninterrupted possession of the land, accompanied by the usual acts of ownership of the claimant and its predecessors in title and occupancy, together with the assessment and payment of taxes thereon by the respective occupants, supplemented by the usual circumstances tending to show private ownership.

The evidence shows that on June 14, 1860, Kapaakea and Keohokalole conveyed all their real and personal property to C. R. Bishop as trustee for creditors with power and directions to collect the income and apply it to the payment of the debts of the grantors. Probate Record No. 1839, which covers the administration of the intestate estates of both Kapaakea and Keohokalole, shows that Mr. Bishop, as trustee, accounted to J. O. Dominis, administrator. The account shows the regular receipt for rent from one Martin for the land of Kioloku covering the years from [37] 1861 to 1868 inclusive.

In 1870 the administrator being discharged, a partition deed was made between the four children and heirs at law of Kapaakea and Keohokalole, whereby the several tracts of land which Keohokalole died seized and possessed of were divided between them, the Ahupuaa of Kioloku being among the lands set off to David Kalakaua (afterwards King of the Hawaiian Islands). The petitioner has admitted that from the date of the partition deed (1870) to the present time Kalakaua and his succes-

sors in interest (including the claimant) have held actual, open, continuous, uninterrupted and adverse possession of the land, using it for the purpose for which it is adapted, namely, for the cultivation of sugar cane and for pasturage. Such adverse possession having been maintained for a period of fifty-two years next prior to the filing of the petition herein, and inferentially for a period of fifty-eight years, extending back to about the year 1855, when the Land Commission could have made the award of the land to Keohokalole.

The petitioner has also admitted that the land has been assessed by the several Governments—the Monarchy, the Provisional Government, the Republic of Hawaii, and the Territory of Hawaii—to, and the taxes so assessed paid by the successive occupants since 1870 to the present time.

The record title, as shown by mesne conveyance from Kalakaua to the claimant, is regular and complete.

The evidence adduced also discloses a number of corroborating circumstances of more or less cogency tending to support the contention of the claimant. In this connection it is deemed pertinent to observe that as early as 1852 Kioloku seems to have been generally known as “Konohiki” land, that is to say, privately owned land. Tending to show this there are old maps and surveys, and a [38] description of a Kuleana within the boundaries of Kioloku, and surveys and descriptions of other lands adjoining this Ahupuaa, whereby Kioloku was referred to as “konohiki,” and not as “unassigned” or “Govern-

ment" land, which as contradistinguished from "konohiki," would have been properly designated by the term ordinarily used with reference to such land, namely, "Aupuni."

It was held, *In re Pa Pelekane*, 21 Haw. 175, 186, that a reference in the description of one piece of land to another is evidence of the character of the latter.

It is proper, in this connection, to mention the fact that, on behalf of the petitioner, there is also in evidence some more recent maps and references to Kioloku, tending to show that it was unassigned, or Government, land. But, in my opinion, the weight of the evidence upon this phase of the case is strongly in favor of the claimant's contention.

The record of the Boundary Commissioner for the Third Judicial Circuit (R. A. Lyman) shows a proceeding, brought in 1873, under the statute for the settlement of the boundaries of lands which had been awarded by their ancient Hawaiian names, without surveyed descriptions. That proceeding was had upon the application of David Kalakaua, (who claimed title through the above-mentioned partition deed) for the settlement and adjudication of the boundaries of the Ahupuaa of Kioloku. The record shows that the owners of the adjoining lands had been notified of the proceedings as required by law. In response to the notice, as appears by the Commissioner's record, His Majesty King Lunalilo (owner of the adjoining Ahupuaa of Honuapo) represented by J. G. Hoapili, and the Government (owner of the adjoining Ahupuaa of Kaunamano)

represented by W. T. Martin, appeared. The hearing proceeded, testimony was taken and a judgment defining the boundaries of the land by a surveyed [39] description was entered (Boundaries Certificate No. 57). The respective owners of the adjoining lands of Honuapo and Kaunamano had a right to be heard lest their lands should be encroached upon by the judgment which would be entered defining the boundaries of Kioloku. No objection having been made by either of them to the hearing of the application of Kalakaua, it would seem that it amounted to an admission on the part of the King (Lunalilo), as the owner of Honuapo, and of the Government, as the owner of Kaunamano, that Kalakaua had the right to maintain the proceeding as the owner of Kioloku. This piece of evidence, as I view it, is important and of much probative force, for the reason that all the parties concerned, the Commissioner, the King, the Government's representative, as well as Kalakaua, were in a position to know the exact status of Kioloku and the precise nature of Kalakaua's title. Upon this precise question, *Re Boundaries of Paunau*, 24 Haw. 546, the court held that "A boundary commissioner is authorized to decide and certify boundaries upon the petition of an owner and his jurisdiction exists only in cases where the petitioner's ownership of the land claimed in his petition is not contested."

After the case at bar was closed, it was reopened on motion of counsel for the petitioner for the purpose of introducing in evidence a copy of the application made by Kalakaua to the commissioner of

Boundaries in 1873, which, being translated from Hawaiian into English, reads as follows: [40]

“To the Honorable Rufus A. Lyman,
Commissioner of Boundaries,
Island of Hawaii.

“The undersigned states, that A. Keohokalole had lands. She did not receive awards from the Land Commissioner to some of her lands; but she still holds said Ahupuaas to this time. Therefore, herewith apply to settle the boundaries of said lands, according to their names hereinunder, thus

	Ahupuaas	District	Island
1.	Lililoa	Puna	Hawaii
2.	Nalua	Kau	“
3.	Kamakamaka	“	“
4.	Kapauku 5	“	“
5.	Mohoeka	“	“
6.	Kioloku	“	“
7.	Ilikahi	Kona	“

“Property owners adjoining these lands be also called to appear on the day set for action on these lands, before the Land Commission,

“Applicant,
“(Sgd.) D. KALAKAUA.

“Honolulu, June 23d, 1873.”

Upon the foregoing copy of the application of Kalakaua to the Commissioner of Boundaries, being admitted in evidence, the following stipulation of facts was filed:

“STIPULATION AS TO AGREED FACTS.

“The following facts relating to the lands mentioned in the application of D. Kalakaua to the Boundary Commissioner of the Island of Hawaii, dated June 23d, 1873, other than the land of Kioloku, are for the purpose of this case agreed upon by the parties hereto, and it is stipulated and agreed by the said parties that said facts shall be considered by the Court in the determination of this cause with the same effect as though they had been testified by witnesses:

“(1) Lililoa, Puna, Hawaii. This land is also called Iliililoa. No hearing was had or taken by the Commissioner of Boundaries with respect to this land upon the application of D. Kalakaua, or otherwise. In 1896 it was sold and conveyed by the Government to John T. Baker, by Grant No. 3954.

“(2) Nalau, Kau, Hawaii. This is an ili within the Ahupuaa of Kaunamano. No hearing was had or action taken by the Commissioner of Boundaries with respect to this land upon the application of D. Kalakaua, or otherwise. A portion of it containing an [41] area of 52.50 acres was sold and conveyed by the Government in 1856 to Keauwemaka by Grant No. 2118. The remainder was homesteaded by the Government in 1913, and sold and conveyed to various parties by various grants.

“(3) Kamakamaka, Kau, Hawaii. No hearing was had or action taken by the Commissionēr of Boundaries with respect to this land upon the application of D. Kalakaua, or otherwise. No land in the district of Kau is at the present time known by this name, nor is there any map or other record in the Government survey office by which it can be identified.

“(4) Kapauku 5, Kau, Hawaii. This land is now known by the name of Paukunui, and is an ili within the Ahupuaa of Kaunamano. No hearing was had or action taken by the Commissioner of Boundaries with respect to this land upon the application of D. Kalakaua, or otherwise. A portion of this land containing an area of 205.50 acres was sold and conveyed by the Government in 1859 to Kalakuniai by Grant 2653. Other portions were homesteaded by the Government in 1913, and sold and conveyed to various parties by various grants.

“(5) Mohakea, Kau, Hawaii. This land was also known as Mohokea. No hearing was had or action taken by the Commissioner of Boundaries with respect to this land on the application of D. Kalakaua. Its boundaries were settled and adjudicated by the Commissioner of Boundaries in two parcels in and by Boundary Certificates Nos. 93 and 94, issued June 14th, 1876, to Princess Ruth Keelikolani upon her application. This land, together

with other lands claimed by the Princess formed the basis for a compromise with the Government, whereby the Trustees of the Estate of B. P. Bishop, successors in interest to Princess Ruth, relinquished all claim to certain lands designated as unassigned lands in consideration of the issuance of patents for three of them which said compromise was ratified by the legislature of the Hawaiian Kingdom by Chapter 78 of the Laws of 1890.

“(6) Ilikahi, South Kona, Hawaii. No hearing was had or action taken by the Commissioner of Boundaries with respect to this land upon the application of D. Kalakaua or otherwise. The land was sold by the Government in several parcels to various parties in 1852 and 1853 by Grants numbered 866, 927, 1145, 1174, and 1175.

“(7) That no Land Commission Award covering any of the said lands can be found in the records of the Land Commission or other public records.

“Dated Honolulu, December 27th, 1918.

“TERRITORY OF HAWAII,

By J. LIGHTFOOT,

Deputy Attorney General.

“HUTCHINSON SUGAR PLANTATION
COMPANY,

By ROBERTSON & OLSON,

Its Attorneys.” [42]

The application of Kalakaua to the Commissioner of Boundaries was to settle the boundaries

of seven Ahupuaas, including the Ahupuaa of Kioloku. The stipulated facts show a marked difference between the status and treatment of the six Ahupuaas other than Kioloku, and of Kioloku itself. This difference is significant, and imposes upon the Court the duty of endeavoring to find a reasonable solution of the questions thus presented.

The Ahupuaa of Kamakamaka cannot now be located or identified, thus showing how, in the lapse of time, former knowledge with reference to lands and titles in these islands has been lost or forgotten.

The Ahupuaa or Mohakea, evidently never belonged to Keohokalole, for its boundaries were afterwards settled by the Commissioner on the application of Princess Ruth Keelikolani.

The Ahupuaas, Lililoa, Nalua, Kapauku and Ilikahi were consistently regarded, treated and dealt with as Government lands. Of the seven tracts of land thus mentioned, only Kioloku was recognized as the property of Keohokalole, and under the partition deed of 1870, as Kalakaua's, and its boundaries were settled upon his application and with the knowledge or acquiescence of the Government.

The petitioner places great reliance upon the statement made by Kalakaua in his application of June 23, 1873, to the effect that no award had been issued to his mother, Ane Keohokalole. However, the conduct and all the acts of all the persons who have ever had anything to do with Kioloku (except

as to this one statement made by Kalakaua), including the various [43] Governments of these islands, throughout the entire history of Kioloku, down to the filing of the petition herein, were and are inconsistent with the alleged ownership of the petitioner, and consistent with the alleged ownership of the claimant. In this respect the petitioner, at most, can claim but one fact as against a long chain or other facts in evidence which supports the undisturbed and long continued possession of Keohokalole and her successors in interest, which, to my mind, strongly tend to show that Kioloku was privately owned. If Kalakaua was not the owner of Kioloku, why did the Boundary Commissioner, with the acquiescence of the Government, recognize him as the owner, and settle the boundaries of the land upon his application? Why was Kalakaua's application favorably acted upon only as to Kioloku, if, as a matter of fact, it belonged no more to him than did the other lands named in his application? There must be some reason or explanation for the distinction made between Kioloku and the other lands. There are, apparently, two theories, either of which is reasonable. One is, that Kalakaua was mistaken, and the surveyors and Government officials, who evidently believed that Keohokalole had acquired title, were right. This would satisfactorily account for the fact that Kalakaua was given a certificate of boundaries for the land, and the further fact that the land has ever since been regarded, treated and taxed as private property. The other theory upon

which a solution of the matter may be had is, that upon the filing by Kalakaua of his application an arrangement or settlement by way of compromise was entered into between him and the Government whereby his title to Kioloku would be recognized and confirmed in consideration [44] of his withdrawing or not pressing his application as to the other lands named, direct evidence of which arrangement or settlement cannot now be found.

Upon this phase of the case it would seem that the doctrine of presumptions, which permeates the remedial side of our system of jurisprudence, may appropriately be invoked. This doctrine applies to contracts, settlements, or compromises, as well as to the issuance of grants of lands and other muniments of title, when the circumstances involved (there being no direct evidence of the fact) affords a natural, reasonable and logical explanation of the state of facts shown in evidence and leading to a proper and just conclusion.

Best on Presumptions (Sec. 109) says:

“There is hardly a species of act or document, public or private, that will not be presumed in support of possession. Even Acts of Parliament may thus be presumed, as also will grants of the Crown.”

With reference to the authorities which discuss this question of presumptions in a general way and show the wide application of the doctrine in the determination of legal controversies, the following are cited:

1 Greenleaf, Evidence, Sec. 17, 32, 45;

1 Jones-Horwitz, Evidence, Secs. 11, 76, 76a, 77;

State vs. Wright, 41 N. J. L. 478;

Carter vs. Fishing Co., 77 Pa. 310;

Williams vs. Mitchell, 112 Mo. 300, 312, 314;

“A grant from the sovereign may be presumed from long continued peaceable possession of real property, accompanied by the usual acts of ownership, even as against the sovereign itself.” 2 C. J. 290.

In harmony with the authority last cited the following cases are particularly in point: [45]

Grimes vs. Bastrop, 26 Tex. 310, 315;

Caruth vs. Gillespie, 68 So. 927, 929;

Carter vs. Walker, 65 So. 170;

State vs. Dickinson, 129 Mich. 221;

Central Coal & Coke Co. vs. Penny, 173 Fed. 340, 343, 346;

Tracy vs. R. Co., 39 Conn. 382, 393;

U. S. vs. Chaves, 159 U. S. 452, 464 (40 L. Ed. 215, 220);

U. S. vs. Chavez, 175 U. S. 509, 518 (44 L. Ed. 251, 251).

In the case of U. S. vs. Chaves, *supra*, at page 220 (L. Ed.), the Court said:

“Without going at any length into the subject, it may be safely said that by the weight of authority, as well as the preponderance of opinion, it is the general rule of American law that a grant will be presumed upon proof of

an adverse, exclusive and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et de jure*, wherever, by possibility, a right may be acquired in any manner known to the law.”

In the case of *U. S. vs. Chavez, supra*, at pages 258, 259 (L. Ed.), the Court said:

“The title asserted by appellees is deficient in the support of direct evidence. Is the deficiency supplied by the probative force of the possession of the land? Private ownership of the property with possession is claimed for over one hundred and thirty years before the cession of the territory to the United States. A continuous possession is shown from some time prior to 1716. Mexico respected that ownership and possession for the full period of its dominion over New Mexico, Spain respected them for over one hundred years, and at the time of the cession of the sovereignty over the territory to the United States no one questioned them. Succeeding to the powers and obligations of those governments, must the United States do so? This is insisted by their counsel, and yet they have felt and expressed the equities which arise from the circumstances of the case. Whence arise those equities? That which establishes them may establish title. Upon a long and uninterrupted possession, the law bases presumptions as sufficient for legal judgment, in the absence of rebutting circumstances, as formal instruments, or records, or

articulate testimony. Not that formal instruments or records are unnecessary, but it will be presumed that they once existed and have been lost. The inquiry then recurs, Do such presumptions arise in this case and do they solve its questions?" [46]

Under circumstances similar to those in the Chavez case, *supra*, the Kingdom of Hawaii respected the private ownership and possession of the land in question for a period of twenty-three years or more, the Provisional Government and the Republic of Hawaii respected such ownership and possession for a period of about seven years, and the Territory of Hawaii likewise respected such ownership and possession for a period of thirteen years. During this entire long period of years, under the several Governments mentioned, this private ownership and occupancy of Kioloku continued undisturbed and adverse to the whole world.

Upon the question as to whether there must be proof that the award or grant was actually made, the opinion of the Court in *Fletcher vs. Fuller* (120 U. S. 534, 30 L. Ed. 759), referred to in the Chavez case, *supra*, at page 259 (L. Ed.), is as follows, and makes it clear that such proof is not required:

“‘In such cases ‘presumptions,’ as said by Sir William Grant, ‘do always proceed on a belief that the thing presumed has actually taken place. Grants are frequently presumed, as Lord Mansfield says (*Eldridge vs. Knott*, 1 Cowp. 215), merely for the purpose, and from

a principle of quieting possession. There is as much occasion for presuming conveyances of legal estates, as otherwise titles must forever remain imperfect, and in many respects unavailable, when from length of time it has become impossible to discover in whom the legal estate (if outstanding) is actually vested.' *Hillary vs. Waller*, 12 Ves. Jr. 239, 252.'

"And quoting Mr. Justice Story in *Richard vs. Williams*, 7 Wheat. 59, 119 L. Ed. 398, 413, " 'a grant of land may as well be presumed, as a grant of a fishery, or a common, or of a way. Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to, or an admission of an existing adverse title, in, the [47] party in possession. It is not necessary, therefore, in the cases mentioned, for the jury, in order to presume a conveyance, to believe that a conveyance was in point of fact executed. It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed, and that its existence would be a solution of the difficulties arising from its non-execution.' "

“And, further, the Supreme Court of Tennessee, in *Williams vs. Donel*, 2 Head, 695, 697, ‘It is not indispensable, in order to lay a proper foundation for the legal presumption of a grant, to establish a probability of the fact that, in reality, a grant was ever issued. It will afford a sufficient ground for the presumption to show that, by legal possibility, a grant might have been issued. And this appearing, it may be assumed—in the absence of circumstances repelling such conclusion—that all that might lawfully have been done to perfect the legal title was in fact done, and in the form prescribed by law.’ ”

In *U. S. vs. Pendell*, 185 U. S. 189, 198 (46 L. Ed. 866, 871), the Court, speaking relative to the presumption of a grant, said:

“The evidence is sufficient not only to presume a grant, but to presume any other matter which would have occurred in order to render the grant a perfectly valid one, and the evidence of it is sufficient within the requirements of the treaty” of 1853 with Mexico.

As to payment of taxes. The payment of taxes on land is evidence of a claim of title by one in possession in cases between individuals.

O. R. & L. Co. vs. Kaili, 22 Haw. 673, 678;
Holtzman vs. Douglas, 120 U. S. 278, 284 (42 L. Ed. 466, 468).

Such payment is also potent evidence against the Government which has levied and collected taxes

upon land, as it practically amounts to an admission of title in the party who has paid the taxes.

In the case of *Busby vs. R. Co.*, 23 S. E. 50, 53, which was an action for damages against the railroad company, the plaintiff was required to prove title to his land, and relied upon evidence of adverse possession, but there was no evidence that the land [48] had ever been granted by the state. It was shown, however, that the plaintiff had paid taxes on the land during the period of fifteen years, covering the time of adverse possession. The Court said:

“Now, the fact that the plaintiff had been paying taxes on the land for a number of years
* * * and the further fact that it did not appear that the state was setting up any claim to this land do afford evidence—whether sufficient or not it was for the jury to determine—that the state had parted with its title to the land for certainly we would not be justified in assuming that the state would collect taxes on its own land.”

In the case of *Jover vs. Insular Government*, 221 U. S. 623, 633, which originated in the Court of Land Registration in the Philippine Islands, and involved in a controversy between the petitioner and the Government over certain tide-lands, the petitioner claimed title under a grant made in 1859 by the Spanish Governor General. The respondent contended that the Governor General had no authority to make the grant. As in the case at bar, the title had not been disputed by the former

Government of the country, but on the contrary, as in the case at bar also, the Government had imposed taxes on the land as private property. With reference to that point the Court said:

“The Spanish authorities at Manila, although familiar with what was done and claimed under the grant, and although in a position to know and enforce the law applicable to it, did not call in question at any time during the thirty-nine years of Spanish dominion after it was made, but, on the contrary, treated it as valid by imposing taxes upon the land as private property. This is persuasive proof that in making the grant the Governor General did not exceed his authority.”

The fact that in the case the validity of the grant was disputed, and not its issuance, does not differentiate it from this so far as concerns the principle involved. The point of the matter is that by levying and collecting taxes on land [49] (except where it appears to have been done by mere inadvertence) the Government admits that the land does not belong to it, but that the title to the land has passed into private ownership.

Where taxes have been collected upon land for a long period of time by the former Government of the country it is no proper function of a new Government to attempt to disturb the possession and uproot the title of the party from whom taxes have been collected, and other facts and circumstances indicate strongly that title was obtained from the Government, merely because evidence of the original award

which might have been issued over sixty years before the title was questioned, cannot be found.

The petitioner contends that

“It is clearly proven that no grant was ever made of the land in question; that it therefore falls within the category of unassigned lands, and, under the authority of *Thurston vs. Bishop*, 7 Haw. 421, remains the property of the Government notwithstanding any claim of title by reason of long continuous occupation of the land by the plantation.”

As I view the case of *Thurston vs. Bishop*, the only point it decided was that the statute of limitations does not run against the state. The claimant does not rest its case upon the statute of limitations, but upon the presumption of a grant.

There is a very clear distinction between the application of the doctrine of the statute of limitations and that of the presumption of a grant. The former does not operate against the sovereign, while the latter does. The presumption of a grant exists independently of the statute of limitations. [50]

“A grant from the sovereign may be presumed from the long-continued, peaceable possession of real property accompanied by the usual acts of ownership, in which case defective links in the chain of title will be supplied by presumption and the title declared perfect; and such presumption exists independently of the statute of limitations.” *Caruthers vs. Gillespie*, 68 So. 928.

Carter vs. Walker, 65 So. 170, 171; U. S. vs. Chaves, 159 U. S. 453, 464 (40 L. Ed. 215, 220).

Counsel for the petitioner also cites the case of Kahoomana vs. Minister of the Interior, 3 Haw. 635, in support of his contention that "the presumption of a lost grant cannot in any event be entertained against the territory."

In that case there was no claim of a previous grant or of a lost grant. That question was not involved, the sole question being that of adverse possession. In the language of the Court therein (p. 636), "The plaintiff claims that her possession and that of her ancestors, thus traced (from 1829), was continuous, notorious and peaceable, and undisturbed until 1872, and therefore she had acquired a title to these premises as against the Government and as against third parties." Thus making it clear that the only title the plaintiff claimed was that by long possession, and that she "acquired a title by adverse possession," and not by grant. And, inasmuch as the statute of limitations does not run against the sovereign or Government, she, of course, had no valid claim or title. It is obvious that the court was not in that case dealing with the common-law presumption involved in the case at bar, but with the statute of limitations.

That the Court was dealing only with the question of the statute of limitations, as applied to adverse possession, is [51] obvious, as is further shown by the following language, found on page 640:

“The theory of titles by presumption is, that the holding possession of an estate openly and adversely for a certain length of time, creates an inference that there was a grant from the adverse claimant or his ancestors, and the statute of limitations forbids the adverse claimant from setting up against this long continued possession, the fact that there was no grant.”

And when the Court in that case says, that ‘as against the Government, a grant cannot be presumed or inferred from long possession,’ it must be understood as meaning that the statute of limitations does not run against the Government; otherwise, the statement would be *obiter dictum*, for grants, ordinarily, will not be presumed upon possession alone.

“The party relying on his possession may, of course, call to his aid the statute of limitations where it is applicable, and if he relies upon the statute, the proofs must show compliance with its provisions. But the *statute of limitations does not supersede the common-law presumption*, and, if this is relied upon, possession for less than a period prescribed by the statute, may, with other cogent circumstances, sustain the claim of conveyance or of a lost grant. The length of time which brings a given case within the legal presumption of a grant or charter to validate a right long enjoyed is not definite, but depends on its peculiar circumstances. It may be necessary to seek the aid of this presumption in some cases where the *statute of limitations*

does not apply, as where it is urged against the state," 1 Jones-Horwitz, Evidence, Sec. 77.

Also, as further clearly pointing out the distinction between adverse possession and the common-law presumption of a grant, the following language, contained in the same section of the authority just mentioned, is quoted:

"It may be well here to point the distinction which suggests itself from a perusal of the cases. At first sight, there appears no clear reason why in the one case the claimant should rely on prescription and in the other on the statute of [52] limitations. There should be no confusion between them, and the sole cause of the confusion is the adoption of the period named in the statute of limitations as a guide merely for the court. When the claim is based on possession and the spectre of a title, the law usually materializes the spectre for the claimant, and may use the period named in the statute for guidance and comparison with that which the claimant exhibits; when the claim is based on adverse possession, which by its very terms excludes any shadowy base of claim (for it is on the physical opposition to all claims—the original seizure of the neglected right of some other person), then the statute of limitations is called into operation and the claims must proceed in the course therein laid out. Where mere adverse possession is to pass the title and bar a recovery, the statute of limitations has by express provision specified the length of time for which such possession must

continue, and if courts were to presume a grant solely upon the ground of adverse possession for a period less than the statute provides, and so bar a recovery by the true owner, the statute would be defeated."

In conclusion, after a careful consideration of all the evidence herein, and the law applicable thereto, I find that the Territory of Hawaii, the petitioner herein, has no right, title, or interest whatsoever in or to the Ahupuaa of Kioloku, the land in question, and, therefore, has no right to have the same registered.

The petition is dismissed. Decree accordingly.

(Signed) J. T. DE BOLT,
Judge of the Land Court.

Dated at Honolulu, T. H., January 29, 1919. [53]

Land Court, Territory of Hawaii.

PETITION No. 283.

In the Matter of the Petition of the TERRITORY
OF HAWAII.

Decree of the Land Court.

This cause having come on for hearing on October 22 1918, the Territory of Hawaii, the petitioner herein, appearing by J. Lightfoot, Deputy Attorney General, the Hutchinson Sugar Plantation Company, a California corporation, the claimant herein, appearing by Robertson & Olson, its Attorneys, and the court having heard the evidence in said cause and the arguments of counsel, and finding that the petitioner

has no right, title or interest whatsoever in or to the Ahupuaa of Kioloku, the land in question,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the petition be and the same hereby is dismissed.

Dated at Honolulu, Territory of Hawaii, this 4th day of February, 1919, at 3 o'clock and no minutes in the afternoon.

(Signed) J. T. DE BOLT,
Judge of the Land Court.

Filed: February 4th, 1919.

[Seal] (Signed) A. V. HOGAN,
Registrar of the Land Court. [54]

Land Court.

98

Tuesday, September 3, 1918.

Court opened at 2:00 o'clock P. M.

HON. W. S. EDINGS, Judge of the Land Court,
presiding; Registrar, Andrew V. Hogan; Re-
porter, H. R. Jordan.

PETITION No. 283.

In the Matter of the Petition of the TERRITORY
OF HAWAII.

**Minutes of Court—September 3, 1918—Motion to
Set.**

PRESENT: J. Lightfoot, Esq., attorney for peti-
tioner; W. T. Rawlins, Esq., attorney for Mr.
Kauai et al., respondents.

Mr. Lightfoot read motion on file and court set

the date for trial on September 23d, 1918, at 10 A. M.

(S) ANDREW V. HOGAN,
Registrar.

Land Court. 103

Monday, October 7, 1918.

Court convened at 2:00 o'clock P. M.

Hon. J. T. DE BOLT, Judge of the Land Court, presiding; Registrar, Andrew V. Hogan, Reporter, J. L. Horner.

PETITION No. 283.

In the Matter of the Petition of TERRITORY OF
OF HAWAII.

PRESENT: J. Lightfoot, Esq., Deputy Attorney General, attorney for petitioner; Robertson & Olson by A. G. M. Robertson, Esq., attorney for respondent, Hutchinson Plantation Company.

Mr. Robertson requests further time for answer of respondent, of about two weeks.

Mr. Lightfoot objects to delay and gives statement of progress of the case.

Court allows a continuance to 2 P. M. Monday, October 21, 1919. [55]

105

Monday, October 21, 1918.

Court convenes at 2 o'clock P. M.

Hon. J. T. DE BOLT, Judge of the Land Court, presiding; Registrar, Andrew V. Hogan; Reporter, J. L. Horner.

PETITION No. 283.

In the Matter of the Petition of the TERRITORY
OF HAWAII.

PRESENT: Deputy Attorney General J. Lightfoot,
for petitioner; Robertson & Olson by A. G. M.
Robertson, attorney for respondent, Hutchinson
Sugar Company.

On account of another Land Court trial being con-
tinued on this date, the above-entitled matter is con-
tinued to 2 o'clock P. M. October 22d, 1918.

106

Tuesday, October 22nd, 1918.

Court opened at 2 o'clock P. M.

Hon. J. T. DE BOLT, Judge of the Land Court, pre-
siding, Registrar, Andrew V. Hogan; Reporter,
J. L. Horner.

PETITION No. 283.

In the Matter of the Petition of the TERRITORY
OF HAWAII.

Minutes of Court—October 21, 1918—Trial.

PRESENT: Deputy Attorney General J. Light-
foot, attorney for petitioner; Robertson & Olson
by A. G. M. Robertson, attorney for respondent,
Hutchinson Sugar Company.

Mr. Lightfoot read petition to the Court;

It is stipulated and agreed between counsel that
ever since the date of the partition, which was in
1870, David Kalakaua, afterwards, King of the

Hawaiian Islands, and his successors, have been in open, exclusive, notorious, adverse possession of said property, in actual continuance, and in claim of right from that date to the present time.

It is stipulated and agreed between counsel that surveyed description of the land in question, which is claimed both by the Territory of Hawaii and by the Hutchinson Sugar Company, and it is practically the same description as given in the judgment or a certificate of a Boundary Commission, of the land of Kioloku, made in 1874. [56]

It is stipulated and agreed that the taxes on the land have been assessed against and paid by the respondent.

Called by Mr. Lightfoot.—S. M. Kananui sworn:

Respondent admits paragraphs 4 and 6 of petitioner's application for registration of title.

Petitioner rests.

Mr. Robertson addressed court, and furnished a certified copy of letter of January 9, 1888, from W. D. Alexander, surveyor, to the Minister of the Interior, which he read, offered in evidence, and it is admitted in evidence as Respondent's Exhibit No. 1.

Land Court.

107

2 P. M. Oct. 22, 1918.

Called by Mr. Robertson.—Henry Peters sworn:

Land Commission Award No. 9659, Vol. 4, page 86, written in Hawaiian, translation of which is read in evidence in English by the witness, offered in evidence, and is so received as Respondent's Exhibit No. 2.

Said Vol. 4 is a Government record and is not marked in evidence. Certified copy of evidence and official translation thereof to be furnished court for file should the evidence as read in the record be unsatisfactory to the Court.

Grant No. 2656, Vol. 13 of Book of Grants, written in Hawaiian, is translated into English by witness and read into evidence as Respondent's Exhibit No. 3.

Grant No. 2748, Vol. 13, of Book of Grants, written in Hawaiian, is translated into English by witness and read in evidence as Respondent's Exhibit No. 4. [57]

Said Vol. 13 is a Government record and is not marked in evidence. Certified copies of evidence and official translation thereof to be furnished Court for file should evidence as read be unsatisfactory to the Court.

Boundary Commission Book, No. A-1, page 399, for the Island of Hawaii, written in English, is read in evidence by the attorney for the respondent, offered in evidence and so received as Respondent's Exhibit No. 5.

Said Boundary Commission Book is a Government record and is not marked in evidence.

It is stipulated by counsel that there is no reference on record of the ownership of the land of Kioloku.

Vol. 1, No. 3, page 98, Boundary Certificate No. 57, dated October 27, 1874, offered in evidence and received as Respondent's Exhibit No. 6. This evidence was not read, and certified copy is to be filed by the respondent in Court.

Vol. 1, No. 3, page 153, Boundary Certificate No. 74, Courses 1, 16, and 23 read from Hawaiian and translated into English by witness in evidence, offered and received as Respondent's Exhibit No. 7.

Vol. 1, No. 3, page 200, Boundary Commission Certificate No. 91, dated June 14, 1876: Courses 20, 21, 22, 23, 24, 33, 34 and 67 read from Hawaiian and translated into English in evidence by witness is offered and received as Respondent's Exhibit No. 8.

Said Vol. 1, No. 3 is a Government Record and is not marked in evidence.

At 4 o'clock P. M. the Court continued the matter to 2 o'clock P. M., October 23, 1918, and adjourned.

(S) ANDREW V. HOGAN,
Registrar. [58]

Land Court. 108

Wednesday, October 23d, 1918.

Court convened at 2 o'clock P. M.

Hon. J. T. DE BOLT, Judge of the Land Court, presiding; Registrar, Andrew V. Hogan; Reporter, J. L. Horner.

3:05 P. M., October 23, 1918.

PETITION No. 283.

In the Matter of the Petition of The TERRITORY
OF HAWAII.

Minutes of Court—October 23, 1918—Trial (Continued).

PRESENT: Deputy Attorney General J. Lightfoot, attorney for petitioner, Robertson & Olson by A. G. M. Robertson, attorney for respondent, the Hutchinson Sugar Plantation Company.

Called by Mr. Robertson.—George F. Wright sworn:

Map of Kaunamano, Kioloku, etc., offered and received in evidence as Respondent's Exhibit No. 9.

Continued to 10 o'clock A. M. October 25, 1918.

(S) ANDREW V. HOGAN,
Registrar.

109

Minutes of Court—October 25, 1918—Trial (Continued).

Friday, October 25, 1918.

Court convened at 10:20 o'clock A. M.

Hon. J. T. DE BOLT, Judge of the Land Court, presiding; Registrar, Andrew V. Hogan; Reporter, J. L. Horner.

PETITION No. 283.

In the Matter of the Petition of The TERRITORY OF HAWAII.

PRESENT: Deputy Attorney General J. Lightfoot, attorney for petitioner; Robertson & Olson by A. G. M. Robertson, attorney for respondent, the Hutchinson Sugar Company.

Called by Mr. Robertson—Alonzo Gartly sworn, Joseph Swift Emerson sworn, George F. Wright resumes stand.

11:50 A. M., the matter is continued to 2 o'clock P. M. October 25th, 1918.

PETITION No. 283.

In the Matter of the Petition of The TERRITORY
OF HAWAII.

2 o'clock P. M., October 25, 1918.

PRESENT: Court and parties as above.

Registered Map No. 575, dated 1879, entitled "A section of Kau," a record of the Territorial Survey Department, is offered in evidence by Mr. Robertson, and is received as Respondent's Exhibit No. 10.

This exhibit is a Government record and is not marked in evidence. [59]

"Deed of Trust" from A. Keohokalole and husband to Charles R. Bishop, dated June 14, 1860, registered in Book 13, pages 58-61, is offered in evidence and received as Respondent's Exhibit No. 11.

Called by Mr. Robertson—Robert Parker, Jr. sworn:

Supreme Court probate record No. 1839, produced by witness was partly read into the record by the attorney for the respondent, and admitted by the attorney for the petitioner.

Mr. Lightfoot extracted certain parts of said probate record and same were admitted by the counsel for the respondent.

Said probate record is offered in evidence and is received as Respondent's Exhibit No. 11.

Certified copy of "Partition Deed" made between J. O. Dominis et al., with Lydia K. Dominis, dated July 1, 1870, recorded in Book 30, pages 364 to 367, is offered in evidence and is received as Respondent's Exhibit 12.

Extracts of Exhibit 12 were read to the Court by the attorney for the respondent.

Attorney for respondent read parts of several deeds to show title to the respondent, which have been admitted by the attorney for the petition, as a matter of record.

At 3:30 P. M., the respondent rested. [60]

Called by Mr. Lightfoot—W. E. Wall sworn:

There is an argument between counsel as to the propriety of the survey Department altering or making lead pencil notations on Registered Map No. 575 (Respondent's Exhibit No. 11.) Court ruled that the map should be accepted with no reference to lead pencil notations.

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Oct. 25/18.

Land Court. Land Court Petition 283 (continued).

Registered Map No. 1409, of "Kau District," Hawaii, dated September 1, 1885, offered by petitioner and is received in evidence as Petitioner's Exhibit "A."

Registered Map 1455, of date, 1887, of part of the District of Hawaii, offered and received in evidence as Petitioner's Exhibit "B."

Registered Map 1807, Map of Kau, Hawaii, dated 1894, offered in evidence and received as Petitioner's Exhibit "C."

Continued to 9:00 A. M., October 26, 1918.

(Sgd.) ANDREW V. HOGAN,
Registrar. [61]

Saturday, October 26, 1918.

Court convened at 9 o'clock A. M.

Hon. J. T. De Bolt,

Hon. J. T. De Bolt, Judge of the Land Court, Presiding; Registrar, Andrew V. Hogan; Reporter, J. L. Horner.

PETITION No. 283.

In the Matter of the Petition of the TERRITORY
OF HAWAII.

**Minutes of Court—October 26, 1918—Trial
(Continued).**

PRESENT: Deputy Attorney General J. Lightfoot,
Attorney for Petitioner; Robertson & Olson, by
A. G. M. Robertson, Attorney for Respondent,
the Hutchinson Sugar Company,

Court advised the parties that it is understood that the Governor of Hawaii declared this date (October 26th) a holiday. Both parties agreed to continue the trial this date and waive all claims against trial this date, both parties wished the trial to continue today.

Called by Mr. Lightfoot—W. E. Wall resumed stand:

Petitioner agreed to furnish Court with certified copies of Maps of Exhibits "A," "B" and "C" of the petitioner.

Argument relative to pencil memorandums on registered map 575 dated 1879 (Respondent's Exhibit 10) and Court ruled that certified copy of said map be placed on file in court.

Robert C. Leydecker sworn:

List of unassigned lands, occupied by private parties, without any title from the Government, with certificates dated October 22, 1918, of the Librarian of Public Archives (the witness) offered in evidence by the petitioner. Objected to by the respondent, and court ordered same marked for identification, and identified as Exhibit "D" of petitioner.

List of lands omitted in the Mahele of 1848, Island of Hawaii, District of Hilo. List contains 14 sheets of typewritten matter and is certified as a correct copy of the Archives records. Offered by petitioner and received as Petitioner's Exhibit "E." [62]

S. M. Kanakanui resumed stand:

Pages 9 and 10 of the Mahele Book of lands to kings and chiefs, dated January 24, 1848, offered by petitioner, and received in evidence as petitioner's Exhibit "F."

Certified copy of Exhibit "F" to be furnished by petitioner, as the Mahele Book is a Government Record, is it not marked in evidence.

Land Court.

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Land Court Petitioner 283 (continued).

Oct. 28/18.

11:10 A. M., All evidence in and parties rest.

11:15 A. M., Recess is declared to 1:00 P. M., this date.

Court convened at 12:50 P. M., Oct. 26/18.

Mr. Lightfoot argues, and concludes at 2:20 P. M.

Mr. Robertson replies and concludes at 4:40 P. M.

Mr. Lightfoot waives reply and suggests answering per brief.

Court allows petitioner 30 days to file brief, 30 days following for the respondent's brief, and 10 days for petitioner's reply.

At 4:45 P. M. the Court adjourned. There was no reporter at the afternoon session of the court.

(S) ANDREW V. HOGAN,
Registrar.

Land Court. 124

9 o'clock A. M., Saturday, December 14, 1918.

Hon. J. T. De Bolt, Judge of the Land Court, presiding, Registrar, Andrew C. Hogan, Reporter, O. P. Soares.

PETITION No. 283.

In the Matter of the Petition of the TERRITORY
OF HAWAII.

Minutes of Court—December 14, 1918—Motion for Admission of Newly Discovered Evidence.

PRESENT: Deputy Attorney General J. Lightfoot, Attorney for Petitioner; Robertson & Olson by A. G. M. Robertson, Attorney for Respondent, Hutchinson Sugar Co.

Mr. Lightfoot reads petitioner's motion for admission of newly discovered evidence and asks permission to reopen the case. [63]

Mr. Robertson objects to reopening the case and admitting the evidence arguing that the digression of the court in this instance should be against the petitioner, the case having been closed, arguments finished, petitioner's first brief and the respondent's

brief in answer filed, and moves for a denial of the motion.

Court is of the opinion that it cannot disregard material evidence and the motion for admission of new evidence is granted.

Mr. Lightfoot is to file certified copies of the new evidence which is in Hawaiian, and the translation. On reading the translation of the new evidence, Mr. Robertson stated he had no objection to the translation Mr. Lightfoot is to present. Mr. Lightfoot is ordered to file same on December 16, 1918.

Trial is set for 9 o'clock A. M., Saturday, December 28, 1918. The matter of briefs will be set at a future time.

Land Court.

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9 o'clock A. M., Saturday, December 28, 1918.

Hon. J. T. De Bolt, Judge of the Land Court, presiding; Registrar, Andrew V. Hogan; Reporter, O. P. Soares.

PETITION No. 283.

In the Matter of the Petition of the TERRITORY
OF HAWAII.

Minutes of Court—December 28, 1918—Stipulation as to Agreed Facts.

PRESENT: Robertson & Olson by A. G. M. Robertson, Attorney for Hutchinson Sugar Co., Respondent.

No appearance for the petitioner.

Mr. Robertson presents stipulation as to agreed facts and filed same. Court orders that the peti-

tioner file brief in 10 days from this date and the respondent within 10 days thereafter.

(S) ANDREW V. HOGAN,
Registrar.

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1:30 P. M. February 26, 1919.

Hon. J. T. De Bolt, Judge of the Land Court, presiding; Registrar, Andrew V. Hogan.

PETITION No. 283.

In the Matter of the Petition of the TERRITORY
OF HAWAII.

**Minutes of Court—February 26, 1919—Proposed
Issues for Jury Trial.**

PRESENT: Deputy Attorney General J. Lightfoot,
Attorney for Petitioner; [64] Robertson &
Olson by A. G. M. Robertson, Attorney for
Hutchinson Sugar Plantation Company, Con-
testant.

Two issues are proposed by the Hutchinson
Sugar Plantation Company and are filed in the rec-
ord in the land court.

Mr. Lightfoot offers to amend issue No. 1 to read
as follows:

“From all the evidence in this case, includ-
ing the facts agreed upon, and all reasonable
inferences to be drawn therefrom, does the jury
find that the land of Kioloku was an “un-
assigned” land, title to which never passed
from the king or the government by an award
or grant.”

Mr. Lightfoot objects to the 2d issue proposed by Mr. Robertson, claiming that there is no need for it.

The Court is of the opinion that the 2d issue is a proper one.

Mr. Lightfoot will present an order, asking for the first issue, and states he does not want to be a party to the second issue.

Court will sign an order for the two issues. Mr. Lightfoot suggests that the petitioner submit one issue (#1) and the contestant issue No. 2.

Court suggests both parties request their issues and the court will incorporate them in form made by the court.

(S) ANDREW V. HOGAN,
Registrar.

Land Court. 148

2 P. M., Wednesday, March 5, 1919.

Hon. J. T. De Bolt, Judge of the Land Court, presiding; Andrew V. Hogan, Registrar; G. D. Bell, Reporter.

PETITION No. 283.

In the Matter of the Petition of the TERRITORY
OF HAWAII.

Minutes of Court—March 5, 1919—Issues for Jury Trial.

PRESENT: Deputy Attorney General J. Lightfoot,
Attorney for Petitioner; Robertson & Olson, by
A. G. M. Robertson, Attorney for Contestant,
Hutchinson Sugar Plantation Co.

The matter before the court is the hearing of the

jury issues for consideration in the trial of the above-entitled matter [65] before the Circuit Court on the appeal from the decree of the land court.

There are two issues, which Mr. Lightfoot reads to the court. Mr. Lightfoot states that issue No. 1 is the issue proposed by the petitioner, and takes exception to the framing of issue No. 2, which was proposed by the contestant.

Mr. Robertson filed certain objections to proposed jury issues and asked for a hearing on his objections. The court suggests setting a date for hearing said objections.

Mr. Lightfoot asks for an extension of time in order to frame issues.

At 2:40 P. M. the Court hears counsel on contestant's objections to jury issues.

Mr. Robertson asks whether an appeal might better be taken to the Supreme Court instead of trial by jury, arguing that there was no question as to the facts in evidence. Mr. Lightfoot states there was a dispute in the land court trial as to the question of fact as to the meaning of the word "kono-hiki" land, and reiterates demand for jury trial.

Mr. Robertson states that the one issue presented by the petitioner makes the issue for the jury incomplete, and asks that his objections to the matter of jury issues be sustained, unless the petitioner files complete issues. Mr. Robertson further states that the contestant has no issues.

The court states that it has prepared two issues,

No. 1 of which was proposed by the petitioner and No. 2 offered by the contestant at an earlier date, that it incorporated these two issues and that it was ready to allow them. The court thereupon overruled the first objection of the contestant and sustained the second and third, there being three objections in all. [66]

Mr. Lightfoot states that it would be better if the court would issue a special order as to its overruling objection No. 1 and sustaining objections Nos. 2 and 3.

The court is of the opinion that Jury issue No. 1, with issue No. 2, is incomplete.

Mr. Robertson states that a Minute Order would be satisfactory to him instead of a special order as to ruling on objections of the contestant as to jury issues. Said special order is not made at this time.

The court signs the jury issues prepared by the court at 3 o'clock, P. M. this date.

There being no further matters before the court, an adjournment is taken.

Minute Order.

In the matter of the petition of the Territory of Hawaii, No. 283, the court orders that a minute order be made to the effect that the court on this date overruled objection No. 1 of counsel for the contestant and sustained objections Nos. 2 and 3, said objections being to proposed jury issues for the trial

of the above-entitled matter in the First Circuit Court by a jury.

(S) ANDREW V. HOGAN,
Registrar. [67]

TRANSCRIPT OF TESTIMONY.
LAND COURT PETITION NO. 283.

LAND OF KIOLOKU,
KAU, HAWAII.
TERRITORY OF HAWAII,
Petitioner. [68]

Territory of Hawaii, Land Court.

PETITION No. 283.

In the Matter of the Petition of the TERRITORY OF HAWAII to Register and Confirm Its Title to the AHUPUAA OF KIOLOKU, in the District of Kau, Island and County of Hawaii, Territory of Hawaii.

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Appearances, Joseph Lightfoot, Esq., on behalf of Petitioner,

A. G. M. Robertson, Esq., on behalf of Respondent or Contestant, Hutchinson Sugar Plantation Co.
[69—1]

Territory of Hawaii, Land Court.

PETITION No. 283.

In the Matter of the Petition of the TERRITORY OF HAWAII to Register and confirm Its Title to the AHUPUAA OF KIOLOKU, in the District of Kau, Island and County of Hawaii, Territory of Hawaii.

Oct. 22, 1918.

Mr. LIGHTFOOT.—Judge Robertson and myself have had some little dealings with a view to shortening the proceedings as much as possible in this court and have agreed to stipulate certain facts to obviate the necessity of offering evidence to prove the same. Your Honor, will notice that, in the first place, in paragraph two of the petition the Territory sets up what the claim of the Hutchinson Sugar Plantation Co. is, which is, briefly ——— (States) Now, to shorten up the proceedings it has been agreed that — the Territory stipulates and agrees that, ever since the date of the partition deed, which was in 1870, David Kalakaua afterwards King, and his successors, have been in open, exclusive, notorious adverse possession of said property under a claim of right—

Mr. ROBERTSON.—Actual and continuous.

Mr. LIGHTFOOT.—Actual and continuous and under a claim of right and from that day to the present time.

Now, also in the interests of saving time, counsel on the other side, I understand, is willing to stipulate and [70—2] agree that the description of the land in question which is attached to the petition is a proper survey and description of the land in controversy which is claimed both by the Territory and by the Hutchinson Sugar Plantation Co., and that it is practically the same description given in a judgment or a certificate of the boundary commissioner, Judge Lyman, of the land of Kioloku, made in 1874, I think?

Mr. ROBERTSON.—Yes.

Mr. LIGHTFOOT.—In 1874. If that admission can be made in open court, either in that form or in any form that counsel wishes to put it, it will save money.

Mr. ROBERTSON.—We make the admission as stated by counsel.

Mr. LIGHTFOOT.—Then, as it seems to us, may it please the Court, the only thing we have to do is to make a prima facie showing that this land is unassigned—

Mr. ROBERTSON.—Your admission—

Mr. LIGHTFOOT.—Oh, yes, there's a further admission that we wish to make, if the Court please, and that is that since the land went to Kalakaua, at all times since that; that is, in 1870 or thereabouts, the taxes have been paid by the successors in interest of Kalakaua, from that time to the present date.

Mr. ROBERTSON.—I would like to suggest a small amendment in phraseology there,—that the

taxes on the land in dispute have been assessed against and paid by the respective parties during their respective possessions, from that time up to date.

Mr. LIGHTFOOT.—That is more accurately stated and is admitted. I think that covers all. Mr. Kanakanui, take the stand, please. [71—3]

Testimony of S. M. Kanakanui, for Petitioner.

S. M. KANAKANUI, a witness called on behalf of petitioner, being first duly sworn, testified as follows:

Direct Examination.

By Mr. LIGHTFOOT.—Q. Your name please?

A. S. M. Kanakanui.

Q. What is your business? A. Surveyor.

Q. And where are you now employed, if anywhere?

A. In the land office; title searcher.

Q. Searcher of titles in the land office of the Territory of Hawaii? A. Yes, sir.

Q. How long were you thus employed?

A. A little over a year.

Q. A little over a year, and before that time what was your occupation? A. I was surveyor.

Q. And where were you employed?

A. Employed at the Government survey department.

Q. How long were you thus employed?

A. Oh, pretty near thirty years.

Q. Pretty near thirty years. Have you had occasion, during your professional employment, to in-

(Testimony of S. M. Kanakanui.)

investigate the title of Kioloku? A. Yes, sir.

Q. Have you found any land commission award, any royal patent or any grant of the land of Kioloku to anyone?

A. In my search I failed to find the—any award or any land contained in the Mahele of 1848, neither in the award of the land commissioners, nor in the grants issued by the Government, nor in the—in any other disposition made by the Government, [72—4] of the land of Kioloku in Kau.

Q. And your search has been exhaustive on those matters? A. Yes, sir.

Mr. ROBERTSON.—I object to that question. It is not for this witness to say whether his search has been exhaustive.

Mr. LIGHTFOOT.—How extensive has been your examination of these records, Mr. Kanakanui?

A. Oh, as far as my time and ability serves.

Q. Has there been any record or book that you have not examined containing grants or award by the Government of land?

Mr. ROBERTSON.—I object to the question. I submit he may testify to what he has examined but not as to what he has not, because there may be something that he doesn't know about.

Mr. LIGHTFOOT.—Withdraw the question.

Q. Beginning with the Mahele book, have you examined the book of Maheles? A. I did.

Q. Is there in the Mahele book any division mentioning the land of Kioloku? A. There is not.

Q. Referring to Ceasar Kapaakea, the father of

(Testimony of S. M. Kanakanui.)

Kalakaua, is there any mahele of land in the Mahele book relating to his land? A. Yes, sir there are.

Q. In that Mehele book is there any mention, under the head of Ceasar Kapaakea, of the land of Kioloku? A. There is no mention.

Q. It is neither set apart to Kapaakea nor set apart for the King? A. Yes, sir, it is not.

[73—5]

The COURT.—Q. Not, you say? A. Not.

Q. Not set apart.

Mr. LIGHTFOOT.—Q. Referring now to the Mahele book, under the name of Annie Keohokalole, wife of Ceasar Kapaakea, is there, in the Mahele book, any mahele of the lands of Annie Keohokalole?

A. There is a mahele.

Q. There is a mahele?

A. Yes, lands of Keohokalole, but the Kioloku, land now under consideration, is not contained in that mahele.

Q. I see.

A. Either to Keohokalole herself or to Kamehameha Third.

Q. And no mention is made—

A. And no mention is made.

Q. —of Kioloku in that mahele? A. No.

Q. Referring now to the records of the Privy Council, have you examined those records with reference to the land of Kioloku?

A. I have examined them, yes, sir.

Q. And they are all now indexed, are they not?

A. Yes, sir.

(Testimony of S. M. Kanakanui.)

Q. In the archives. Have you examined the indexes? A. I did not.

Mr. ROBERTSON.—What is that answer?

The COURT.—Q. But you have examined the records, you say?

A. I have, the records in the Privy Council.

Mr. ROBERTSON.—Q. The index?

A. **Not the index.**

The COURT.—A. As I understand, you have examined the records [74—6] themselves?

A. Yes, sir.

Mr. LIGHTFOOT.—Q. Did you find in the records of the Privy Council any reference to the land of Kioloku?

A. I didn't find any mention of the land of Kioloku in the record. I have looked into the Privy Council.

Q. Have you examined the books of the land commission awards of the land commission?

A. **I have.**

Q. Do the indexes of those books—they are indexed, are they not? A. Yes, sir.

Q. Have you examined the indexes of the books?

A. Yes, sir.

Q. Is there in those books any award of the Ahupuaa of Kioloku?

A. Award of the Ahupuaa of Kioloku?

Q. Yes.

A. There is none. There is one on the books of the land commission.

Q. You seem to lay stress upon the word “Ahu-

(Testimony of S. M. Kanakanui.)

puaa" there. Is there any award of the land of Kioloku, irrespective of whether it is an ili aina or an ahupuaa or lele or any other award of Kioloku?

A. There are a few awards—There are a few small awards to natives.

Q. That is, Kuleanas within the—

A. Within the Ahupuaa of Kioloku.

Q. But no award of the whole land? A. Eh?

Q. But no award of the land as described in this petition?

A. No award—No award of the Ahupuaa itself.
[75—7]

Q. The only awards being of the kuleanas within the ahupuaa? A. Yes.

Q. And those awards that you have found in the land commission award books have not described the land claimed in the present petition?

A. Those small awards? They are within the bounds of the land of the petition.

Q. Coming down to the royal patents, have you examined the records of all royal patents granted?

A. I have.

Q. Have you found any records of any royal patent either to Kapaakea, to Annie Keohokalole or anyone else of the Ahupuaa of Kioloku?

A. In my examination of the patents to Kapaakea and Keohokalole I found that the land of Kiokoku did not—was not included in any of those patents.

Q. In any of the royal patents?

(Testimony of S. M. Kanakanui.)

A. And not in any other patent?

Q. And not in any other patent? A. Yes.

Q. Or patent grant, royal patent—

A. Or patent grant, yes.

Q. Or land grant?

A. Patent grant and land grant is the same.

Q. They are all the same thing. Sometimes they are called royal patent grants and sometimes land grants, but they are the same thing?

A. They are the same thing.

Q. Have you examined any other books of the Government; that is, other than those heretofore enumerated, showing grants of land by the Government to private individuals or corporations? [76—8]

A. I have examined the record of the deeds, of the Government deeds to private parties and I found that the land of Kioloku was not included in any of those deeds.

Q. Is the land included under any definition of fort lands?

A. Oh, fort lands are only confined to lands in the—in the district of Honolulu.

Q. Is there any record in any grant in the records of school lands of Kioloku? A. School lands?

Q. Yes; it is not in the list of school lands?

A. Not in the list of school lands.

Q. Or of Crown lands? A. Or the what?

Q. Or the Crown lands?

A. Neither in the school lands nor in the Crown lands.

(Testimony of S. M. Kanakanui.)

Cross-examination.

By Mr. ROBERTSON.—Q. What did you say your present position is?

A. What's that?

Q. What did you say your present position is in the Government?

A. Oh, surveyor and title searcher.

Q. Surveyor and title searcher? A. Yes.

Q. You have had that position for about one year?

A. One year.

Q. Before that you were a surveyor in the employ of the Government? A. Yes, sir.

Q. You say you have examined the records of the Privy Council? [77—9] A. Yes.

Q. With reference to a search for the land of Kioloku? A. Yes, sir.

Q. How did you make that search?

A. What do you mean?

Q. Well, how did you search the books?

A. Why, I searched from volume to volume; from volume one to volume two, three, and four—

The COURT.—A. Turn leaf by leaf.

A. Yes, sir.

Q. Page by page?

A. It was some eight or nine years ago that I took the part of—of a title searcher for the Government, but not officially, to look into the questions of Government titles to lands, and in that capacity I had the opportunity of going over to the Privy Council—to rake out and read over the Privy Council records.

(Testimony of S. M. Kanakanui.)

Q. You went through all of them?

A. All of them, yes.

Mr. ROBERTSON.—Q. How many volumes did you search?

A. I think about nine or ten.

Q. Do you remember how many pages those volumes contained on an average?

A. Oh, some three, some four—four hundred pages.

Q. As high as eight hundred pages, some of them, don't they? A. Eh?

Q. Some of them as much as eight hundred pages?

A. I think so.

Q. Yes, Do you mean to say you read all those books through page by page? [78—10]

A. I read all those pertaining to lands.

Q. Well, those Privy Council records are chronologically arranged, are they, from day to day and from year to year as the meetings of the privy council were held? A. Yes.

Q. The land matters are not separated from other matters pertaining to the Government, are they? A. I know.

Q. What's that? A. Yes, sir.

Q. You mean no? Are the land matters separated from other matters?

A. No, they are all together.

Q. Not separated? A. Not separated.

Q. Well, when you say you read every page of the privy council records pertaining to land matters, what do you mean?

(Testimony of S. M. Kanakanui.)

A. I read those items in the privy council pertaining to lands; those items in the records of the privy council what concerning to land.

Q. I see. So you don't claim to have read every page in all those books of privy council records; you picked out that which you supposed referred to land, is that it?

A. Well, by reading page after page I come across an item where they refer to land and I take note of it.

Q. How long did it take you to do that?

A. Oh, for six or eight years, I think.

Q. Six or eight years? A. Yes.

Mr. ROBERTSON.—We have been allowed two weeks to make that search, your Honor. [79—11]

Q. And you are unable to find any reference in the privy council records to the Ahupuaa of Kio-loku, is that it? A. Yes, sir.

Q. No reference of any kind?

A. Not that I know of.

Q. Well, it is still possible that you may have missed it, may you not, in looking through those books?

A. May or may not, but I am sure I didn't come across it.

Q. Some of the records of the privy council proceedings are in Hawaiian and some in English?

A. Yes, sir.

Q. Now, going to the records of the land commission, you refer to the land commission established by the Act of 1845, do you?

(Testimony of S. M. Kanakanui.)

A. Yes, sir.

Q. How many volumes of those records are there?

A. About ten.

Q. Ten volumes, and several hundred pages in each volume, are there not? A. Yes, sir.

Q. Do you claim that you read those volumes over page by page or how did you search the land commission records?

A. I never read every one of the pages but I read by title every one of them almost.

Q. Almost every one of what?

A. Of those awards, of those ten volumes.

Q. So you didn't go through page by page like you did the privy council records?

A. About nine years ago I went to the land commission books page by page, right through. [80—12]

Q. What were you looking for at that time?

A. Whether patent had been issued on the awards.

Q. Patent issued on the award of what?—of any land, you mean?

A. Any land contained in the land commission books.

Q. At the time that you made that search you were not searching for the land of Kioloku, were you? A. I was searching for all lands.

Q. Well, as I understand you, at the time you made that examination you were simply checking up as to whether royal patents had been issued on the various awards of the land commission?

(Testimony of S. M. Kanakanui.)

A. Yes, sir.

Q. There was no question about the title of Kioloku at that time, was there?

A. Oh, the question of the title of Kioloku went far back, I think further back than 1909.

Q. Well, let me ask you this: At the time that you made the search of the land commission records that you are now referring to you were not searching with reference to this particular land?

A. No.

Q. And the same is true in regard to the search of the Privy Council records, isn't it; you were making a general search there and not any special search, with reference to any lawsuit about Kioloku?

A. Well, I was searching for Kioloku as well as the other lands in the privy council.

Q. You were making a general search?

A. Yes, sir.

Q. Did you compile any statistics or anything from that search you made at that time? [81—13]

A. When I find—In my book those subjects that vitally interested the subject that I took I got it in my book.

Q. And none of those subjects related to Kioloku?

A. None, because I can't find any.

Q. Well, I will ask you this; when you say you couldn't find it, as a matter of fact you were not making a special search in regard to Kioloku at that time, were you?

A. Not especially to Kioloku; not confined only

(Testimony of S. M. Kanakanui.)

to Kioloku, but there are other lands which the Government involved—

Q. Were you making a general search with reference to Government lands? A. Yes, sir.

Q. Or Government claims to lands?

A. Government claims to lands.

Q. Yes. Do you remember how many awards altogether were made by the land commission?

A. Oh, pretty near eleven thousand awards.

Q. Something over eleven thousand? A. Yes.

Q. Do you know whether there is an award for each number or whether any numbers were skipped?

A. There's some one or two or three apanas in one award; some as high as fifty apanas in one award.

Q. I understand, one award may cover more than one piece of land? A. Yes.

Q And in some cases as high as fifty separate pieces? A. Yes.

Q. What I mean is, are you prepared now to say, from whatever searches you have made of the land commission records, as to [82—14] Whether any numbers of any—any of the numbers between 1 and 11,000, say, are missing, and not there?

The COURT.—The award was made and not placed in the award book?

Mr. ROBERTSON.—No—

A. There are several awards by their numbers, index numbers.

Q. Yes.

A. Some of them are thrown out, some are not

(Testimony of S. M. Kanakanui.)

awarded, and some had been awarded.

Q. Exactly, so that if the highest number—if the number of the last award in the land commission records is 11,000, that doesn't mean that there were actually 11,000, awards made by the commission, does it? A. No, no.

Q. And the reason of that is that there are some numbers that are missing?

A. No, had never been awarded; some of the claims never been awarded.

Q. I understand that.

The COURT.—Q. Well, those that were not awarded could not be given a number, could they?

A. O yes, there was a number.

Q. Number just the same. A. Yes.

Mr. ROBERTSON.—Q. Well, as a matter of fact, are there not some numbers between 1 and 11,000 that are not represented even by unawarded claims?

A. Those claims might have been made to the board, and the board registered the number of those claims.

Q. Yes.

A. But the proof never came. [83—15]

Q. Yes.

A. And they never have been adjudicated and were thrown out.

Q. Exactly, that is one class, but, as a matter of fact, between the number of 1 and the number of 11,000, are there not some numbers that are not represented even by an unawarded claim?

(Testimony of S. M. Kanakanui.)

A. I don't catch you. You mean that the claim was filed, and the claim was missing?

Q. No, no, no, that there are some numbers between 1 and 11,000 of which there is nothing in the record to show that any claim, even an unawarded claim, was made; that is, that certain numbers between those, the first and the last, that are not represented by any record?

The COURT.—Q. That is, say here is No. 4 and here is No. 6, and you don't know a thing about No. 5; no record whatever about it, is that the idea?

A. I know this much; there are some numbers had been made and other numbers had been substituted to take that claim, the same claim, and the other one was ignored.

Mr. ROBERTSON.—Q. That is, claim number so and so may have been by a certain person for a certain piece of land, but the award of that number may have been to somebody else, of another piece of land? A. I have seen it.

Q. Exactly. A. I have seen it.

Q. But you don't get me, quite, yet. Aren't there some numbers between the number 1 and the number 11,000 of which there is nothing in the land commission records which relates to such number? 84—16] A. There might be, but I can't say.

Q. Can't say as to that? A. Can't say.

Q. In your search of the land commission records you never had that point in mind, did you?

A. I did not.

Mr. ROBERTSON.—I think that's all.

Mr. LIGHTFOOT.—That's all.

I think you will admit paragraph four, will you not, that the land is now in occupation? We allege in paragraph four that the lands are in the present occupation of the Hutchinson—

Mr. ROBERTSON.—What is it?

Mr. LIGHTFOOT.—That the lands are in the occupation of the Hutchinson Sugar Co., at the present time?

Mr. ROBERTSON.—Yes, certainly; in the occupation of the Hutchinson Sugar Co., claiming ownership.

Mr. LIGHTFOOT.—Will you admit the allegations of the sixth (reads) without proof?

The COURT.—The question is, will he admit?

Mr. LIGHTFOOT.—Yes, admit that. It is a matter of law.

Mr. ROBERTSON.—Well, it seems to me that what we would admit would be this, that if the land belongs to us, as we claim it does, the Government would have an easement for a public highway according to the roads mentioned.

Mr. LIGHTFOOT.—I think that would be sufficient to cover everything. Then we rest, if the Court please.

Mr. ROBERTSON.—Under the procedure laid down by the Supreme Court I am not at liberty to move for a nonsuit or dismissal without resting. Not being prepared to rest—unless the Court of its own motion, which it has the power to do, should

dismiss [85—17] the petition for lack of proof—I will proceed.

The COURT.—I don't think it is proper for the Court of its own motion to direct a nonsuit.

Mr. ROBERTSON.—Well, we will proceed, then, your Honor.

(Makes opening statement.)

I wish to offer this in evidence. That is a report of Professor Alexander to the Minister of the Interior.

Mr. LIGHTFOOT.—You offer this in evidence, Judge?

Mr. ROBERTSON.—Yes.

Mr. LIGHTFOOT.—We will note a formal objection to the introduction of the document on the ground that it is incompetent, irrelevant and immaterial. (Argument.)

The COURT.—Official, is it? Official record?

Mr. ROBERTSON.—Yes, your Honor, official report.

Mr. LIGHTFOOT.—Yes, a letter to the Minister of the Interior, a report to the Minister of the Interior.

Mr. ROBERTSON.—If your Honor please, it would be along the same lines as Mr. Kanakanui's—

Mr. LIGHTFOOT.—Yes, so we make the formal objection.

The COURT.—Well, we will admit it in evidence.

(Read.)

Mr. ROBERTSON.—There is a discrepancy in

the dates, but I have just told counsel it doesn't make any difference in this case whether the date was 1888 or 1889; that being the beginning of a new year, somebody evidently made a mistake.

(Exhibit 1 for contestant.) [86—18]

Testimony of Henry Peters, for Respondent.

HENRY PETERS, a witness called on behalf of contestant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. ROBERTSON.—Q. Your name is Henry Peters? A. Yes, sir.

Q. What is your public position?

A. Clerk in the land office.

Q. Of the Territory of Hawaii? A. Yes, sir.

Q. Are the records of the land commission of 1845 kept in your office? A. Yes, sir.

Q. And are the records of the boundary commissioners—

Mr. LIGHTFOOT.—May I object to that, please? There is a mistake there. You have said the land commission of 1845. The land commission was not created until December the 10th, 1845, and didn't take office until February—was not appointed until February, 1846.

Mr. ROBERTSON.—Well, what I mean is the land commission under the act of 1845.

Q. I mean the land commission which was appointed to discharge its duties under the act of 1845.

A. Yes.

(Testimony of Henry Peters.)

Q. Those records are kept in your office, are they not? A. Yes, sir.

Q. State whether or not the records of the boundary commissioners of the several boundary commissioners of this Territory, are also kept in your office. A. Yes, sir. [87—19]

Mr. LIGHTFOOT.—I object to the question of the records of the boundary commissioners, they having no bearing on the issues of this case. The records of the boundary commissioners merely settled and certified the boundaries; didn't affect the titles at all. (Argument.) We make the formal objection that it would be immaterial, as not settling title; has nothing to do with the title.

The COURT.—Objection is overruled. I think it will throw some light.

Mr. ROBERTSON.—Simply a preliminary question.

Mr. LIGHTFOOT.—We make all these objections merely for the purpose of not letting our rights go.

Mr. ROBERTSON.—I haven't got to the point of offering them yet; simply preliminary.

Q. Have you brought with you, under subpoena, from the records of the land office, land commission award No. 9659? A. Yes, sir.

Q. Well, what volume is that award contained in? A. Volume 4.

The COURT.—Now, it is possible, I may want to take this matter under advisement, and would like to have certified copies of these translations.

(Testimony of Henry Peters.)

Mr. ROBERTSON.—Yes. The land commissioner has been out of town for a week or so, and I have been unable to get certified copies.

The COURT.—I mean sometime during the hearing of the case.

Mr. ROBERTSON.—Yes. The reason I haven't got certified copies is because there is no officer here to certify them. I will offer these primarily and not ask the Court to keep the official records here, but to supplement or substitute [88—20] certified copies.

Q. Land Commission Award 9659, Volume 4, page what? A. Page 866—886.

Q. This volume and page shows Land Commission Award No. 9659 issued to whom?

A. To Kekahuna.

Q. Land situated where? A. Kioloku.

Q. District? A. No, Island of Hawaii.

Q. The record is in Hawaiian, is it?

A. Yes, sir; in Hawaiian.

Q. Will you read in English the record of that award? A. Number nine thousand—

Q. We have had that already.

A. This land of Kekahuna, at Kioloku, Kau—

Q. Then follows the description, does it not?

A. Yes.

Q. Read the description.

A. Commencing at the East corner and running
1. South 20 degrees West 6.50 chains along land of the Konohiki. 2. North 60 degrees 45 West 12.55 chains along land of Konohiki. 3. North 30

(Testimony of Henry Peters.)

West 5.27 chains along land of Government.
4. South 68 15 East 14.21 chains along land of Aupuni to the point of beginning—to the point of commencement. Within this land $71\frac{1}{2}$ acres, Kau, Hawaii, April 8th, 1852.

Q. Yes. A. J. Fuller, Surveyor.”

The COURT.—Now, I imagine the fact of certified copies—How about translations as well when it is in Hawaiian?

Mr. ROBERTSON.—Well, I was just wondering now, as this has been read into the record, whether a certified copy is necessary. [89—21]

The COURT.—It is not if I have the reporter make a copy.

Mr. ROBERTSON.—It might be advisable to file a certified copy in any event.

Q Then follows a diagram showing the shape of the land, does it not? A. Yes, sir.

The COURT.—In what way is that pertinent, Judge Robertson, to this question?

Mr. ROBERTSON.—I am going to show, your Honor, the location of this land with reference to the land in dispute, and I am going to call your Honor's attention to the diagram in the award, “Konohiki,” “Konohiki,” “Konohiki”; in other words, the diagram of the survey in the award shows this kuleana surrounded by Konohiki lands, for the reason that the— That is the ahupuaa now. (Showing.) Here's this award here to Kekahuna, and this diagram here shows that it is surrounded by Konohiki land and not Government land.

(Testimony of Henry Peters.)

(Argument.) I won't need to ask from time to time to withdraw the volume; the understanding is that the official records will be taken back by the witness and we will—if the reading of these documents into the record is not sufficient we will substitute certified copies.

The COURT.—Just make a note of the volume and page.

Mr. ROBERTSON.—And we offer that in evidence.

The COURT.—That will be received.

Mr. LIGHTFOOT.—We make the same objection. (Contestant's Exhibit 2.)

Mr. ROBERTSON.—Q. State whether or not you have with you Grant No. 2656 of the records of your office? A. Yes, sir; I have it here.

Q. What volume is that contained in? [90—22]

A. Volume 13.

Q. On what page? A. No page.

Q. Oh, no page? A. Yes.

Q. Those records go by number of grant in consecutive order? A. Yes.

Q. That is a grant to whom? A. To Kaiahua.

Q. It is in the Hawaiian language, is it?

A. Yes, sir.

Q. What is the date of it?

A. Date, December 14, 1859.

Q. Will you read that in English, please, that grant? A. The whole thing or just description?

Q. Well, the whole thing.

A. No. 2656. Royal Patent. By this Royal Pat-

(Testimony of Henry Peters.)

ent makes known. Kamehameha the Fourth, by the grace of God King of the Hawaiian Islands, makes known to all men that he has, for himself and his heirs, given absolutely in fee simple to Kaiahua, his faithful and loyal subject, that certain piece of land situated at Pohina, Kau, on the Island of Hawaii—

Q. And then follows the description.

A. Then, “Bounded and Described as follows”—

Q. Read the description.

A. “Commencing at the North corner, on the seashore, and running along the boundary of Kioloku North 76 degrees third—

Q. 76 and a third degrees?

A. 76 and a third degrees, yes, West 4.20 chains, North 82 and $\frac{3}{4}$ West 6 chains. Thence along land of Kaleikau, South 29 and $\frac{3}{4}$ West 13.90 chains to a wiliwili tree marked ‘R.’ Thence along land of Kauwemaka, South 41 degrees West 27.95 chains along [91—23] that of the Government; South $27\frac{1}{4}$ degrees West 24.15 chains. Thence along the land of Kalakaui South $40\frac{1}{2}$ degrees West 8.80 chains; thence along that of the Government, South 56 degrees East 23.10 chains; thence along land of Kalakunia North 82 degrees East 54 chains to the seashore. Thence along the seashore to the first point or the point of beginning. Containing 264 acres, reserving the right of native tenants—containing 264 acres more or less. This is the reason why this land given for—

Q. This is the reason for the conveyance.

(Testimony of Henry Peters.)

A. This is the reason for the conveyance, that he has paid in Royal Exchequer the money, one hundred dollars, but reserving to the Government all my mineral or metallic mines of every description, for Kaiahuna—

Q. “To,” isn’t it?

A. No, “for,”—“To Kaiahua”—

Q. “To Kaiahua”?

A. Yes. “This land is given for himself and his heirs—for himself in fee simple and to his heirs, his administrators forever, subject to the taxes levied by the legislature from time to time on all fee simple land. In witness whereof I have hereunto set my hand and caused the seal of the Hawaiian Islands to be affixed at Honolulu, this 14th day of December, 1859. L. Kamehameha. Witness Kaahunanu.”

Mr. ROBERTSON.—We offer that in evidence, if the Court please.

Mr. LIGHTFOOT.—We object to it, if the Court please. It doesn’t seem to us to have any bearing on the issue.

The COURT.—It is admitted in evidence.

(Contestant’s Exhibit 3.)

Mr. ROBERTSON.—Q. Have you brought with you, under subpoena, [92—24] from the records of your office Grant No. 2747?

A. 2747 or—?

Q. 2747. A. Yes. No—2747? 2749.

Q. 2747, Kaleikau.

A. Oh, this is 2747.

(Testimony of Henry Peters.)

Q. 2748 it ought to be. A. No.

Q. Eh?

A. No. 2748? No—I think 2748, I think.

Q. 2748 shows a land in Puna?

A. No, that is the name of the land, Kau; this is the name of the land.

(Question read by reporter as follows: “Q. Have you brought with you, under subpoena, from the records of your office Grant No. 2747.”)

Mr. ROBERTSON.—Change that to 2748.

Q. What is your answer? A. Yes, sir.

Q. In what volume does that appear? A. 13.

Q. Volume 13. Please read it.

A. “No. 2748. Royal Patent. By this Royal Patent makes known Kamehameha 4th, King—by the grace of God, King of the Hawaiian Islands, to all men that he has this day and for his successors have given absolutely in fee simple to Kaleiku”—

Q. Kaleiku?

Q. —“his faithful and loyal subject, all that land situated at Pohina, Kau, on the Island of Hawaii, bounded and described as follows: Commencing at the West corner of this at the pile of stone along the land of Kauwemaka, West $84\frac{1}{4}$ East 21.80 chains to a wiliwili tree marked ‘R.’ Thence along Government [93—25] North $29\frac{3}{4}$ East 13.90 chains to a stone wall on the boundary of Kioloku. This land—No, boundary of Kulaku; thence along said land North $79\frac{1}{4}$ West 21.28 chains, South 28 West 14.97 chains to the point of beginning. Contain-

(Testimony of Henry Peters.)

ing 29.8 acres, reserving the right of native tenants. Containing—

Q. And the rest of that patent is in the same form as the previous one you have just read, is it?

A. Yes, sir.

Q. Signed by the same parties? A. Yes, sir.

Q. And dated?

A. Dated first day of May, 1861.

Mr. ROBERTSON.—We offer that in evidence, your Honor.

The COURT.—It may be received in evidence.

(Contestant's Exhibit 4.)

Mr. ROBERTSON.—Q. State whether you brought with you, under subpoena, the record of the boundary commissioner for the Island of Hawaii? A. Yes, sir.

Q. Volume A, No. 1? A. Yes, sir.

Q. Will you please refer to page 399 of that volume? A. Yes, sir, I have it.

Q. State whether or not on that page there is any record with reference to a proceeding to settle the boundaries of the Ahupuaa of Kioloku in the District of Kau? A. Yes, sir, there is.

Q. Written in the English language, is it not? A. Yes, sir.

Mr. ROBERTSON.—We offer this in evidence.
[94—26]

Mr. LIGHTFOOT.—We submit that, for the reason formerly urged, it is immaterial to this case what the boundaries of Kioloku are. They are admitted to be correctly described in the petition and,

therefore, any evidence of that would be cumulative. The boundary commissioners were not entitled—not authorized to settle title.

The COURT.—The Government was a party to these proceedings?

Mr. ROBERTSON.—We propose to show that the Government was represented at the proceeding, yes, your Honor.

The COURT.—I think it is pertinent.

Mr. LIGHTFOOT.—I wish to state that the Government was not a party. The Government was not a party to these proceedings. It is true there was a Government—the record shows there was a Government representative of some kind present at the hearing before Judge Lyman, who was commissioner, but the Government was not represented.

(Argument.)

The COURT.—I will admit the document. I want everything before me that can possibly have any bearing upon the matter.

Mr. ROBERTSON.—Have you any objection to my reading this?

Mr. LIGHTFOOT.—No.

Mr. ROBERTSON.—Reads as follows: —at the head of the page, “The Ahupuaa of Kioloku, District of Kau, Island of Hawaii, Third J. C.”—which we claim means Judicial Circuit—“On this, the 14th day of October, A. D. 1873, the Commission of Boundaries for the Island of Hawaii, Third J. C., met at Waiohinu, Kau, on the application of

D. Kalakaua for the hearing of testimony for the boundaries of Kioloku, situated in the District of Kau in said Island of Hawaii”—

The COURT.—Why, that was to fix the boundaries of the land in [95—27] question, then?

Mr. ROBERTSON.—Yes, your Honor. You see I am not reading now— This proceeding here was in October, 1873; this was subsequent to the partition deed of the heirs of Keohokalole whereby Kalakaua was assigned, in the partition between the family, to this land of Kioloku. He then, in 1873, brought this proceeding for the settlement of the boundaries. It was a land that was awarded, like so many others, were by name, and that is what the boundary commissioners were established by law for, was to settle the boundaries of lands that had been awarded by name only, and in that proceeding, according to the regular procedure, notice of the proceeding was given to adjoining owners and they were entitled to be heard, not on the question of the title but upon the boundaries of the land. Now, then, we will show that the boundaries on the west side, the boundary—the land on the west side of Kioloku was a Government land, hence the Government was directly interested in the settlement of the boundaries of Kioloku because it was an adjoining land, and that fully accounts for the Government being represented at the proceeding.

(Continues reading:) “Due notice personally served on owners or agents of adjoining lands as

far as known. Present J. G. Hoapili for the applicant and his Majesty, W. T. Martin for the Hawaiian Government"—Then follows the testimony of witnesses, which I will not take time to read, unless counsel wants it. There was a continuance until the 15th, continuance on account of the illness of a witness, until the 15th of October, 1873, and then the—I will read again: "Boundary commission met at Poohina on October 15th, at the house of the witness Pae, according to adjournment from the 14th inst. Present J. G. Hoapili and J. Kauhane." At the end of the testimony there is this entry: [96—28] *this entry*: "Testimony closed. Decision, boundaries to be as given in evidence of the witnesses of this land and Honuapo, and Royal Patents of adjoining lands. Survey ordered. Notes of survey to be filed previous to certificate of boundaries being issues. R. A. Lyman, Commissioner of Boundaries, Third J. C."

We offer that in evidence.

Mr. LIGHTFOOT.—Wouldn't it be well to stipulate that in the evidence there is no record of any testimony being given as to the ownership of the title of Kioloku? It is ambiguous as it is there.

Mr. ROBERTSON.—I will admit that. That proceeding is not a trial of title; it is a settlement of boundaries. I will admit that no reference was made, with this qualification, Mr. Lightfoot, that Kalakaua was claiming—

Mr. LIGHTFOOT.—Yes, yes.

(Testimony of Henry Peters.)

Mr. ROBERTSON.—With that understanding, that the proceeding was instituted by Kalakaua, claiming to be the owner, there is no other reference to the title of the land, the title not being at issue in that proceeding.

The COURT.—Do I understand the decision of the land commissioner fixed the boundaries of the land in question as they are now claimed to be?

Mr. ROBERTSON.—And ordered a survey.

(Contestant's Exhibit 5.)

Q. State whether or not you have brought with you, under subpoena, from the records of your office, record of the boundary commissioner of the Island of Hawaii, Volume 1 number 3?

A. Yes, sir.

Q. Will you please turn to page 98 of that volume. State whether or not there is recorded there Boundary Certificate No. 57 [97—29] of the boundaries of Kioloku issued by R. A. Lyman, Commissioner of Boundaries, Third Judicial Circuit, under date of October 29th, 1874?

A. Yes, sir, they are.

Mr. ROBERTSON.—I have no interest in reading all this into the record, Mr. Lightfoot. If you will let me withdraw the exhibit and I will file a certified copy—

Mr. LIGHTFOOT.—Can't we even save that expense, Judge, by admitting that the survey there is, for all practical purposes the survey in the petition?

Mr. ROBERTSON.—Yes, I am willing to admit

(Testimony of Henry Peters.)

that, that the survey description in this certificate shows the—or gives a description of the—a survey description of the Ahupuaa of Kioloku which is substantially the same as the description of this land contained in the petition in this case.

Mr. LIGHTFOOT.—That will save time.

The COURT.—Yes, that being the only purpose for which it was offered anyway.

Mr. ROBERTSON.—That's all it is for.

(Contestant's Exhibit 6.)

Q. State whether or not there is contained in that same volume boundary certificate issued by the same commissioner on the Ahupuaa of Honuapo, being No. 74?

A. Yes, sir, 27th day of April, A. D. 1875.

Q. Issued by R. A. Lyman, Commissioner of Boundaries, Third Judicial Circuit, is that right?

A. Yes, sir.

Q. Now, the record shows that the certificate was issued on the application of C. R. Bishop?

A. Yes, sir.

Mr. ROBERTSON.—Unless we can shorten this it will take a lot [98—30] of material to get at the point I want to bring out.

Mr. LIGHTFOOT.—Well, there is only one boundary you want there, isn't there?

Mr. ROBERTSON.—I simply want to lay the foundation for subsequent testimony of a surveyor.

Q. Will you please read here, in the description of the boundaries of Honuapo, the first course?

The COURT.—Is that adjoining or near—

(Testimony of Henry Peters.)

Mr. ROBERTSON.—That is adjoining the land in question? A. North 74 degrees—

Mr. LIGHTFOOT.—Where does it take its departure?

Mr. ROBERTSON.—Q. Commence at—just above that, how does it read from your record here?

A. “Commencing at the seashore at the end of points near place called Hanakaulua and running 1—

Q. And the first course?

A. “North 74 degrees West 25 chains along portion of Hionaa sold to Kelii, Patent No. 826 and Aupuni.”

Q. Now read the 16th course from the same description.

A. 16. South 40 and $\frac{1}{4}$ degrees East 34.70 chains along Kioloku to X cut in the bed-rock of stream at Kamaili.”

Q. Read the 23d course.

A. “23d. South 70 and a half degrees East 45.57 chains along Kioloku to pile of stones.”

Mr. ROBERTSON.—That’s all I want to ask this witness on that. We offer that part of that record in evidence.

The COURT.—It may be received in evidence.
(Exhibit 7.)

Mr. ROBERTSON.—Q. What was the date of that? A. 27th day of April, 1875.

Q. In that same volume you have in your hand there please [99—31] turn to page 200, Cer-

(Testimony of Henry Peters.)

tificate of Boundaries No. 91. Page 200. What do you find there?

A. I find a certificate of boundaries of Waiohinu, District of Kau, Island of Hawaii, Third Judicial Circuit.

Q. Certificate No. what? A. 91.

Q. Issued by R. A. Lyman, Commissioner of Boundaries? A. Yes, sir.

Q. Under what date?

A. The 14th day of June, A. D. 1876.

Mr. ROBERTSON.—This is a good deal like the other, Mr. Lightfoot.

Mr. LIGHTFOOT.—Well, let's save as much as we can.

Mr. ROBERTSON.—Q. All right, will you read the—from the certificate of boundaries of Waiohinu will you read the 20th course?

A. "20. North 30 degrees West 12.60 chains along Government portion of Kiolakaa to a pile of stones."

Q. And the 21st course?

A. "21st. North 39 and $3\frac{1}{4}$ degrees West 17.50 chains along Government land to pile of stone."

Q. And the 22d course?

A. "22d. North 40 and a half degrees, West 33.08 chains along same."

Q. "23d course?

A. "23. North 34 degrees West 16.17 chains along same just below scattering woods."

Mr. LIGHTFOOT.—You have the 21st course. What comes after that?

(Testimony of Henry Peters.)

A. 22d.

Q. And then the 23d?

A. And then the 23d? [100—32]

Mr. ROBERTSON.—Q. Now the 24th course, please?

A. “24th. North 28 degrees 43 minutes West 121.25 chains along Government land to Kalahupala in scattering woods.”

Q. Read the 33d course, please.

A. “33d. South 24 degrees ten minutes East 495 chains along Kaalaiki Government land to Hapuumanu, a high prominence at the lower edge of the thick ohia forest, thence”—

Q. Read the 34th course?

A. “34. South 26 degrees East 30 chains.”

Mr. LIGHTFOOT.—Do you offer to connect it all, Judge?

Mr. ROBERTSON.—By the evidence of a surveyor, yes. I can only put on one witness at a time.

A. (Continuing.) —“along Kaunamano Government land to a point from which the west corner of Kioloku land the Letter “A” cut in bedrock at the junction of two streams bears north 40 degrees East 11 chains, thence”—

Q. And read the 67th course, please?

A. “67. South 12 degrees East 32.65 chains to a pile of stone at the top of the pali; thence along Kahaea Government land”—

Q. That’s all I have to that.

Mr. ROBERTSON.—We offer that in evidence.

The COURT.—It is now four o'clock, the usual time for adjourning.

Mr. ROBERTSON.—All right, your Honor. That is admitted, is it?

(Respondent's Exhibit No. 8.)

Hereupon the further hearing in this matter is continued until two o'clock tomorrow afternoon, [101—33]

Territory of Hawaii, Land Court.

PETITION No. 283.

In the Matter of the Petition of the TERRITORY
OF HAWAII.

Oct. 23, 1918.

Mr. ROBERTSON.—At this time, if the Court please, I would like to give notice to the Territory to produce from the archives of the Government survey office a map of a part of District of Kau, including the land of Kioloku, made by—a survey made by Mr. F. S. Lyman in 1879.

Mr. LIGHTFOOT.—Wouldn't the correct procedure in that case be to subpoena the surveyor of the Territory to bring the map in? Why should we be burdened with producing this thing?

The COURT.—I suppose the motion is made on the theory that it is in your possession.

Mr. ROBERTSON.—Why, certainly.

(Argument.)

I am practically driven to this course from the fact that I can't get a certified copy made over there; made application for it and just been in-

formed that I can't get it. There is no recourse but to have the original produced, and I haven't time now to go out of court and issue a subpoena so I am giving this notice to the opposite party to produce a document in his possession.

Mr. Wright, will you take the stand, please?
[102—34]

Testimony of George F. Wright, for Respondent.

GEORGE F. WRIGHT, a witness called on behalf of contestant or respondent, being first duly sworn, testified as follows:

Direct Examination.

By Mr. ROBERTSON.—Q. What is your name?

A. George F. Wright.

Q. What is your profession? A. Surveyor.

Q. How old are you? A. Thirty-six.

Q. How many years' experience have you had as a surveyor?

A. I started in 1898, about 20 years ago.

Q. Twenty years here in this Territory?

A. In the Islands.

Q. Where you born here? A. Yes.

Q. In the course of your experience in the surveying of lands in this Territory have you had occasion to familiarize yourself with the methods pursued in the original Government records with reference to describing granted or awarded lands?

A. That is, you mean—?

Q. That is, are you familiar with the Government records of awards and grants of land in this Territory? A. I am.

(Testimony of George F. Wright.)

Q. And are you familiar with the Hawaiian words and phrases used in the Government records with reference to various classes of land?

A. Yes; most of them; great many of them.

Q. State whether or not you have ever surveyed the land of Kioloku in the District of Kau, Hawaii?
[103—35]

Q. As well as adjoining lands? A. I have.

Q. At my request, for the purposes of use in this hearing, have you prepared a plan showing the land of Kioloku and the adjoining lands? A. I have.

Q. I will ask you if this is the plan that you have just referred to? A. It is.

Mr. ROBERTSON.—We offer this in evidence.

Mr. LIGHTFOOT.—I have no objection, if the Court please.

The COURT.—It may be received in evidence.

(Exhibit 9.)

Mr. ROBERTSON.—Q. What is the scale, Mr. Wright?

A. 200 feet to an inch. 200 feet—I will just check myself on that (Steps down to map.) No, 500 feet; 500 feet to an inch.

(Map fastened to hat-rack.)

The COURT.—Q. That is correct,—the bottom if north there? A. Yes.

Mr. ROBERTSON.—Q. The land of Kioloku is a long, narrow strip in general shape, is it not?

A. It is.

Q. Running from the sea up to the side of the mountain? A. It is.

(Testimony of George F. Wright.)

Q. And what is the general direction of the length of the land?

A. It is east and west. This is west and runs towards the east. (Showing.)

Q. Long, narrow strip of land running east and west, on the south side of Kioloku, what is the adjoining land, that is, the large [104—36] land?

A. Kaunamano.

Q. Can you state whether or not that was an awarded land or whether it is Government land?

A. Government land.

Q. On the north side of Kioloku, what is the adjoining—or what are the adjoining lands?

A. Honuapo, L. C. A. 8559B, Apana 13, to W. C. Lunalilo, and the Government lands of Hionaa, Hokukano and Kaalaiki.

Q. State whether or not there is a kuleana within the Ahupuaa of Kioloku? A. There is.

Q. State whether or not there are more than one? A. Just one.

Q. Just one. What is the number of that award?

A. L. C. A. 9659 to Kekahuna.

Q. I will call your attention to the diagram in the original award of that kuleana, which specifies “Konohiki” on four sides of it, and ask you to point out to the Court on this map where those four sides are so designated on that diagram.

A. North side, konohiki; West side, konohiki; South side, konohiki; East side, Konohiki. (Showing.)

Q. State whether or not your plan here shows the

(Testimony of George F. Wright.)

location of that award within Kioloku?

A. It does.

Q. The designation of "Konohiki" on the north side of that award refers to what land?

A. To the land of Honuapo.

Q. That is privately owned land under the award to Lunalilo? A. Yes, sir.

Q. On the east side of that award, what land does the designation [105—37] "Konohiki" refer to?

A. Kioloku.

Q. And on the south side? A. Kioloku.

Q. And on the west side? A. Kioloku.

Q. What does the word "Konohiki" as used in old Government surveys indicate as to the character of the land thereby referred to?

A. It means the privately owned lands.

Mr. LIGHTFOOT.—The witness has qualified as a surveyor.

(Argument.)

Mr. ROBERTSON.—Q. Are you familiar with the Hawaiian language?

A. Yes, sir; well, along the line of surveying, and on law only a few words.

Q. You can hold an ordinary conversation with a Hawaiian witness?

A. Well, in anything pertaining to lands. If they are too fast I am no expert.

Q. But you are familiar with the terms used in the Government surveys? A. I am.

Q. In connection with the lands? A. I am.

The COURT.—I think the witness is qualified.

(Testimony of George F. Wright.)

The WITNESS.—Well, the term Konohiki, as a rule, is used in relation to lands privately owned,—not the Government.

Mr. ROBERTSON.—Q. And what is the term for owned by the Government?

A. They generally used “aupuni.” [106—38]

The COURT.—Q. Apuni? A. Aupuni.

Mr. ROBERTSON.—Q. So that where a kuleana is shown by award to be surrounded by land designated as “Konohiki,” it would indicate that it is situated within a larger land privately owned?

A. It would.

Q. State whether or not your plan here shows the location of Grant 2656 *ot* Kaiahua?

A. It shows a portion.

Q. Have you in mind the description of that land? A. I have.

Q. As given in the grant? A I have.

Q. It begins at the north corner at the sea and runs along the boundary of Kioloku. Will you show that, how that runs on the map here?

A. That's the point of beginning, and along the land of Kioloku, running towards the east.

The COURT.—You are letting your pencil go beyond.

Mr. ROBERTSON.—Q. Begins at the sea and runs westerly along Kioloku?

A. Runs towards the east along Kioloku.

Q. Isn't that west, according to the designation?

A. That's right, west, yes, west.

(Testimony of George F. Wright.)

Q. Are you sure that's right? Is north over here?

A. That's north. It runs from the sea along the land—

The COURT.—Q. If the bottom is north that would make it the right-hand side the east?

A. Yes.

Q. And the left-hand side the west? [107—39]

Q. You mean as it stands there now?

Mr. ROBERTSON.—Q. This is west here?

A. West.

Mr. LIGHTFOOT.—The other way around.

Mr. ROBERTSON.—If this is north here, this would be west, of course.

The COURT.—Opposite our right hand—

Mr. ROBERTSON.—Not the right hand of the map. This is the east.

The WITNESS.—This is the east (showing).

The COURT.—Q. Where is this land situated, then?

The WITNESS.—It is the same on that map.

The COURT.—Q. Isn't it on the west side of Hawaii? A. It is in Kau.

Q. Well, that would be the west side?

A. South.

Q. Well, that land extends along north and south or east and west? A. East and west.

Mr. ROBERTSON.—Hilo is on the east coast, Honuapo is on the south coast.

The COURT.—The waterfront is the eastern end of the land.

(Testimony of George F. Wright.)

Mr. ROBERTSON.—Q. This—according to the description in the grant, Mr. Wright, it runs along the land of Kaleikau. Is that shown on your plan?

A. It is. (Pointing.) It is shown on the plan.

Q. And what is the number of Kaleikau's grant?

A. 2748.

Q. Then it runs along the land of Kauwemaka; is that shown on your plan? [108—40]

A. I show grant 2118 to Keawemaka.

Q. According to the grant it is Kauwemaka. At any rate, that is the adjoining land to grant 2748.

A. It is.

Q. Then the next course runs along—the words given in the grant being “Ke aupuni”; where is that on your plan?

A. That is not shown, but it would be a little south and adjoining grant 2118, along the south run of grant 2118.

Q. South of grant 2118? A. Yes.

Q. “Ke aupuni” there, meaning Government land? A. Yes.

Q. And what Government land does this grant adjoin along that course?

A. It is in the general land of Kaunamano. Several small names in there of different Government lands known as Kaunamano.

Q. The Ahupuaa of Kaunamano is a Government land, is it? A. It is.

Q. Then it runs along the land of Kalapunai; is that shown on your plan here?

A. No, but that is a grant to the south of the

(Testimony of George F. Wright.)

Government land which is mentioned in the previous course.

Q. Then it runs again along the Aupuni,—meaning Government? A. Yes.

Q. What side of this grant is that?

A. That would be the south side of grant 2656.

Q. And what Government land is there on that side of this grant?

A. Well, that land at the present is granted; at that time it was Kaunamano. They refer to Government land along—the adjoining piece was granted. [109—41]

Q. That course, like one of the others we have had, runs along the Government land of Kaunamano? A. It does.

Q. The designation in the grant being “Ke Aupuni?” A. Yes.

Q. You have already stated, I believe, that your plan here shows the location of grant 2748?

A. I have.

Q. The correct name of that is—of the awardee, or the grantee rather, according to the record here, is Kaleiku; you have it marked there “Kaleikau?”

A. Kaleikau.

Q. At any rate, that is the identical piece 2748?

A. It is.

Q. The first course of that land, as given in the grant, is along Kauwemaka; you have there “Keawemaka”? A. Keawemaka.

Q. That is which side?

A. The south side of grant 2748.

(Testimony of George F. Wright.)

Q. Then it runs along ke aupuni, meaning Government, in a northeasterly direction.—

A. Well, what was the bearing of the first line?

Q. Well, let's see. This begins at the west corner, as I understand this, and runs along Kauwemaka—I guess you'd better run that over yourself, (Hands witness book) get those directions.

A. Then it runs southeast along Kauwemaka, then northeast along Government land.

Q. What Government land is that referring to?

A. That is referring to grant 2656 to Kaiahua. At that time [110—42] most likely grant 2656 was not granted and was known as Government land.

Q. Then that would be the Ahupuaa of Kaunamano? A. Yes, sir.

Q. As a matter of fact this grant we are speaking of is a grant within the Ahupuaa of Kaunamano?

A. It is. The next course I had there reads, "North $79\frac{1}{4}$ West 21.28 chains by the previous course along Government lands to the boundary of Kioloku."

Q. Yes, and that brings it to the boundary of the land in dispute in this case? A. It does.

Q. And the Kioloku mentioned in that grant is the Kioloku of which we are speaking in this case?

A. It is.

Q. Now referring, Mr. Wright, to the—to boundary certificate No. 74 of the Ahupuaa of Honuapo, and I will call your attention to the first course.

(Testimony of George F. Wright.)

It is north 74 degrees west 25 chains along portion of Hionaa sold to Kelii, Patent No. 826 and Aupuni, is it not? A. That's right.

Q. "Aupuni" there refers to certain Government land? A. It does.

Q. What Government land does it refer to?

A. To the Government land of Hionaa; a portion of the Government land of Hionaa.

Q. Will you please point out to the court where that course runs along Hionaa?

The COURT.—I see Hionaa there twice.

The WITNESS.—It is a Government land with several grants sold. [111—43]

Mr. ROBERTSON.—Q. That is, the easterly portion of Hionaa from the sea up to this dotted line has since been divided up into various grants and sold by the Government, has it not?

A. It has.

Q. Yes. Now where does that first course that we have just read of the Ahupuaa of Honuapoo bring you to?

A. Shall I mark the point? Right from the sea up to this point here.

Q. Designated on your plan here along portion of Hionaa sold by grant 826 and Government?

A. And Government.

Q. In other words you have put on your plan there practically along course first given in the boundary certificate? A. I have.

Q. Now will you turn to the 16th course as given in that boundary certificate, which reads: "South

(Testimony of George F. Wright.)

40 $\frac{1}{4}$ degrees east 34.70 chains along Kioloku to X cut in bed-rock of stream at Kamaili"; where is that course? A. That is here (Showing).

The COURT.—Well, is that as far as it goes?

A. No, Honuapo; that is the outline.

Q. Yes; runs the full length.

Mr. ROBERTSON.—We have jumped, your Honor, from the first course to the 16th, you see.

The COURT.—Yes.

Mr. ROBERTSON.—Q. Will you please designate with a colored pencil on this line here the 16th course that we have just referred to? Mark it "16" if you can.

(Witness marks.)

Q. I think that will do. Now will you turn to the 23d [112—44] course, which reads: "South 70 $\frac{1}{2}$ degrees East 45.57 chains along Kioloku to a pile of stone"; where is that on your plan?

A. (Showing.) Here, 23.

Q You have marked it "23" on the map—plan, have you?

A. That is, the three courses there are practically one line; 23 may come a little further down—unless I use the scale to get it—but it is one of these three courses, see? See, the 21st course is a short course, with 3.4 chains; it must be in here, see? Then the 22d is 19 chains. There's 345 chains along Kioloku, so—

Q. Well, that is substantially where you have marked it there? A. Yes, a portion of this line.

Q. State whether or not in the boundary certifi-

(Testimony of George F. Wright.)

cate the courses given between No. 16 and No. 23 mention any land?

A. 16 mentions along Kioloku—

Q. Yes. Now between 16 and 23— A. 17—

Q. —is the adjoining land named, or does it simply run by courses and distances?

A. It runs by courses and distances.

The COURT.—Q. And 23 along—?

A. Kioloku.

Mr. ROBERTSON.—Q. I want to call your attention now to Course No. 9. How does it read?

A. “South 6.6 chains along Government portion of Hionaa.”

Q. What part of your plan would that 9th course come on?

A. I will mark it No. “9,” this short course running practically north and south.

The COURT.—Q. What is the occasion of those double lines [113—45] there?

A. Well, I have simply put an arrow from here to here, along Government portion of Hionaa.

Q. There seems to be a long narrow strip of land—? A. Yes, sir.

Q. Yes.

A. That is just to show the distance Kioloku borders on the Government land of Hionaa.

Mr. ROBERTSON.—Q. That, go along lines that the Judge refers to, with an arrow at either end, are not boundary marks?

A. No, it simply shows the extent where Honuapo and Hionaa joined one another.

(Testimony of George F. Wright.)

Q. Simply a surveyor's indication. I will call your attention to the 15th course in that boundary certificate. How does that read?

A. "15th. South $36\frac{1}{2}$ degrees west 29.8 chains to Kahawai on the boundary of Kioloku."

Q. What point does that bring you to?

A. That begins at this point and runs to this point. (Showing.) I will mark the course "15."

Q. This is not along Kioloku, it is to Kioloku?

A. It says to Kahawai on the boundary.

Q. Well, you might mark "15." What is the 10th course in that description?

A. 10th. North $83\frac{1}{4}$ degrees west 27.4 chains along do., meaning along Hionaa, to pile of stones. This, I will mark that "10."

Q. Well, that abbreviation "do." means "the same?"

A. Along the same, referring to the land of Hionaa.

Q. The line immediately above that, under which "do." is written, reads, "along Government portion of Hionaa," doesn't [114—46] it?

A. It does.

Q. I want to direct your attention now to certificate of boundaries No. 91, which is in evidence here, giving the boundaries of the Ahupuaa of Waiohinu. No. 91. I will ask you first whether any portion of the land of Waiohinu is shown by your plan here?

A. Yes.

Q. Whereabouts?

A. The portion marked "Waiohinu Government

(Testimony of George F. Wright.)

Boundary Certificate 91," southwest of Kaalaiki and west of Kaunamano.

Q. It is a land—It is a Government land, is it not?

A. Formerly Crown Land, now Government.

Q. Crown Land, yes, and adjoins Kaalaiki on one *said* and Kaunamano on the other side?

A. Yes.

Q. So far as this map shows? A. It does.

Q. I will refer you to the 20th course in the description given in that certificate of boundaries and ask you whether this map shows it?

A. It does not.

Mr. ROBERTSON.—Have you that map I asked you for? (To Mr. Lightfoot.) Mr. Kanakanui, at my request, has brought into court from the survey department a more general map of the district here, which I don't want to put in evidence but I have to have this witness have the use of it for the purpose of explaining his testimony with reference to the land of Waiohinu.

Q. I will ask you to look at this map that Mr. Kanakanui just produced. Does that show the land of Waiohinu? [115—47]

A. It does; the lower portion of it, not the mauka portion of it.

Q. I see. Can you state whether or not—can you show the court by that map where the 20th course in Boundary Certificate No. 91 runs?

A. I can.

Q. That course reads: "North 30 degrees West

(Testimony of George F. Wright.)

12.60 chains along Government portion of Kiolakaa to a pile of stones," does it not? A. It does.

Q. Show the court where that is.

(Witness shows.)

Q. What is this land that is referred to, the land of Kiolakaa? A. Government land of Kiolakaa.

Q. In what direction from Kioloku is that?

A. Westward of Kioloku.

Q. The land of Kaunamano intervenes, does it? How may lands intervene between Kioloku and Kiolakaa?

A. From Kioloku, Kaunamano, Kahilipali nui, Kahilipali iki, Waiohinu and then Kiolakaa. There are several Government lands, but the general name is Kaunamano.

Q. Now the 22d course in that boundary certificate reads; "North 40½ degrees West 33.08 chains along same"; that is the same land, the Government land of Kiolakaa, is it? A. It is.

Q. And the 23d course reads: "North 34 degrees West 16.17 chains along the same"; that is still the government land of Kiolakaa, is it? A. It is.

Q. Now the 24th course in that certificate reads: "North 28 degrees 43 minutes West 121.25 chains along Government land to Kalahupala in scattering woods." [116—48]

A. Thence along Government land to Kalahupala in scattering woods."

Q. Yes. What Government land does that 121 chain run—?

A. It refers to the same land of Kiolakaa.

(Testimony of George F. Wright.)

Q. Kiolakaa. Now the 33d course runs, south 24 degrees 10 minutes east 495 chains along Kaal-aiki Government land to Hapuumanu, a high prominence at the lower edge of the thick ohia forest?

A. It does.

Q. Where is that?

Mr. LIGHTFOOT.—I really—of course counsel promised to connect all this and I have been making no objection on that ground, but we are away and gone from the title that we are interested in.

Mr. ROBERTSON.—The idea is this, the point I am making, and it comes out very clearly, that wherever that land of Waiohinu runs along Government land it says Government land in the boundary certificate, but when it says Kioloku it doesn't designate Kioloku as Government land, which I contend is a very important admission on the part of the old Government surveyors that Kioloku was not Government land.

(Argument.)

The COURT.—Well, we will let it go in. Go ahead.

Mr. ROBERTSON.—Q. Where is that? The question is, Mr. Wright, along what land does that 495 chains run?

A. Along Kaalaki Government land.

Q. On which side of Waiohinu is that, generally speaking? A. On the north side.

Q. On the north side. Now I direct your attention to the 34th course, which reads: "South 26 degrees East 30 chains [117—49] along Kaunamano

(Testimony of George F. Wright.)

Government land to a point from which the west corner of Kioloku land the letter "A" cut in bed-rock at the junction of two streams bears," etc. That is the Government land of Kaunamano that you have already referred to in your evidence, is it?

A. It is.

Q. And on what side, generally speaking, of Waiohinu is that portion of the Government land of Kaunamano? A. North side.

Q. Now I will direct your attention to the 67th course in that certificate, which reads: "South 12 degrees East 32.65 chains to a pile of stone at the top of the pali; thence along the Kahaea Government land"; what land is that, Mr. Wright?

A. That is the name of the land within Kahilipali-iki and the course mentioned as being along the Government land of Kahaea is right here. (Showing.)

Q. That is a Government land? A. Yes.

Q. Generally speaking lying on what side of Waiohinu? A. On the east side.

Mr. LIGHTFOOT.—May we have this map marked so that—of course it can't remain in court—so that we can refer to it afterwards in cross-examination?

Mr. ROBERTSON.—You can certainly refer to it on cross-examination. I am not offering it in evidence; I am simply using it for the purpose of refreshing the witness' memory, because his plan here that we have put in evidence does not cover the ground that this other one does.

(Testimony of George F. Wright.)

The COURT.—I will ask that the same map be produced. (1455.)

Mr. LIGHTFOOT.—That will cover it.

(Adjournment until to-morrow.) [118—50]

Territory of Hawaii.

Land Court.

PETITION No. 283.

In the Matter of the Petition of the TERRITORY OF HAWAII to Register and Confirm Its Title to the AHUPUAA OF KIOLOKU, in the District of Kau, Island and County of Hawaii, Territory of Hawaii,

Oct. 25, 1918.

Mr. ROBERTSON.—If the Court please, we have some witnesses here, two of them from Kau, to give evidence to the effect that the Hutchinson Sugar Co. and its predecessors in interest have not only been in possession of this land for the period covered by the previous admission to date but they have actually used the land for such purposes as the land is adapted to, namely part of it for the growing of sugar cane, a part of it for pasturage of their animals. I understand the Government is now prepared to extend their admission to that fact.

Mr. LIGHTFOOT.—So as to avoid the necessity of calling these witnesses and allowing them to return home.

The COURT.—That will extend to the entire piece of land?

(Testimony of Alonzo Gartley.)

Mr. ROBERTSON.—Yes, your Honor, the land in dispute.

The COURT.—Do you make that admission?

Mr. LIGHTFOOT.—Yes, your Honor.

The COURT.—Let the record show it.

Mr. ROBERTSON.—I have two witnesses to call, short witnesses, if it is agreeable to counsel on the other side. [119—51]

Testimony of Alonzo Gartley, for Respondent.

ALONZA GARTLEY, a witness called on behalf of Contestant Hutchinson Sugar Co., being first duly sworn, testified as follows:

Direct examination by Mr. ROBERTSON.

Q. Your name? A. Alonzo Gartley.

Q. Where do you live? A. Honolulu.

Q. What is your business, occupation?

A. I am manager of C. Brewer & Co.

Q. State whether or not—that is C. Brewer & Co., Ltd.? A. Yes, sir, C. Brewer & Co., Ltd.

Q. State whether or not C. Brewer & Co., Ltd., are the local agents for the Hutchinson Sugar Plantation in Kau? A. They are.

Q. Are you familiar with the plantation property? A. Fairly, yes, sir.

Q. Do you know the land of Kioloku?

A. Kioloku, yes, sir.

Q. Does that form a portion of the plantation property? A. It does.

Mr. LIGHTFOOT.—That is a conclusion of law. We object to it.

(Testimony of Alonzo Gartley.)

The COURT.—Whether or not it forms a part of the plantation?

Mr. ROBERTSON.—It is before the Court by way of admission that the Hutchinson Sugar Plantation is in possession and use of the land.

The COURT.—Objection is overruled.

(Answer read by reporter.)

Mr. ROBERTSON.—Q. Are you familiar with the value of plantation lands in this Territory? [120—52]

A. I am. I have knowledge of some values.

Q. Including the values of the Hutchinson Sugar Company's lands? A. I think I have.

Q. What in your opinion is the value of the land of Kioloku which is in dispute in this case, approximately?

Mr. LIGHTFOOT.—I should like to ask the purpose of this? It doesn't seem to me to be material to any issue before the court.

The COURT.—Possibly an appeal to the Circuit Court of Appeals?

Mr. ROBERTSON.—Yes, your Honor. While I have very high expectations of getting a favorable decision from your Honor, sometimes counsel are mistaken in their sizing up of cases. In case the decision goes against us we will resort to other proceedings.

Mr. LIGHTFOOT.—I don't think it is a proper matter to be brought in this way.

The COURT.—If that is your only objection I will admit it.

(Testimony of Joseph S. Emerson.)

Mr. LIGHTFOOT.—It doesn't seem to me to be material to any issue.

(Argument.)

The COURT.—I will permit the question.

(Question read by official reporter.)

A. I should say eleven thousand dollars.

Mr. ROBERTSON.—Cross-examine.

Mr. LIGHTFOOT.—No cross-examination.

Mr. ROBERTSON.—That's all. [121—53]

Testimony of Joseph S. Emerson, for Respondent.

JOSEPH S. EMERSON, a witness called on behalf of contestant, being first duly sworn, testified as follows:

Direct Examination by Mr. ROBERTSON.

Q. What is your name?

A. Joseph S. Emerson.

Q. Where do you reside?

A. I reside on Magazine Street in Honolulu.

Q. Were you born in these Islands?

A. Born on Maui, Lahainaluna.

Q. And have you lived here all your life?

A. Yes, except when I have been visiting in America, for some eight years, and in Europe for some six or seven years; otherwise I have lived here the rest of my life.

Q. How old are you Mr. Emerson?

A. Seventy-five.

Q. State whether or not you are familiar with the Hawaiian language?

A. I have been brought up in the use of two lan-

(Testimony of Joseph S. Emerson.)

guages, Hawaiian and English, from my childhood.

Q. Do you read and write it as well as speak it?

A. Yes.

Q. Have you a profession?

A. I have been a civil engineer and surveyor, graduate of the Institute of Technology and for a time was doing civil engineering work, and lately, in the Hawaiian Islands, I have been confining myself chiefly to surveying, and for a time was the surveyor of the land court, the Torrens court.

Q. Yes, a part of the time in Government employ? A. For twenty-nine years.

Q. And part of the time practicing your profession on your [122—54] own account?

A. For a very short time.

Q. Will you please tell us what is meant by the Hawaiian phrase "Aina Konohiki"?

A. Aina means land, Konohiki is a title which comes down from feudal times, meaning the landlord. The land in the olden times, before the Great Mahele, was all nominally and really, that is, in fact, the property of the King, and he divided it, and when a revolution took place he could divide it as he pleased, giving this tract to one konohiki, one chief, and another to another; and it—as I always heard it in my boyhood, it was constantly used, it was the chief who owned the land; that is, owned any particular piece of land.

Q. Yes.

A. And he was the feudal lord.

Q. Now you speak of—you used the word "revolu-

(Testimony of Joseph S. Emerson.)

tion" there; what do you refer to?

A. When King Kamehameha First changed the ownership and became the conqueror he could divide up land anew to his followers, as he did, as history records; so that he was the lord and the owner of the land, and all ownership came under the fact that it was from him; he was the source of all ownership and power.

Q. Yes. Well, this revolution that you refer to.—

A. Revolution, the conquest by Kamehameha First.

Q. I see. Well now, later on, in the reign of Kamehameha Third, in the latter part of 1845, particularly, what happened with reference to the lands of this—of these Islands?

A. There was a Mahele took place. The lands were then divided into three great divisions; whereas it all belonged to the king and to whom he gave it, now one-third was set apart for the [123—55] Government, one-third for the King, maintenance of royalty, the royal estate, and one part for the chiefs.

Q. What was the second class of land called; that is, the lands that were set apart for the support of the Crown?

A. It was called Aina Aupuni. The Crown Land was—I don't mean—I didn't mean that. The Crown Land was the—It was called Crown Lands in English—

Q. Not Aupuni but Crown Lands?

A. Not Aupuni, Aupuni being the Government—

(Testimony of Joseph S. Emerson.)

I retract what I said; it was merely a slip of the tongue. The Government lands was the Aina Aupuni; the Crown lands was—they used the word “alii.” And then I say were the konohikis, who were also the various chiefs.

Q. You used the word “Mahele,” which is a Hawaiian word meaning what in English?

A. Division.

Q. So that this mahele that happened in the reign of Kamehameha Third resulted in the division and classification of the large lands of the islands into three classes, the Government lands, or called “Aupuni” in Hawaiian, the Crown lands, which were set apart for the support of the monarch—Monarchy, and, thirdly, the konohikis lands that were set apart for the chiefs, is that it?

A. For the chiefs. I won't say that the konohiki was entirely, always confined to that part, but I never heard it used with reference to the Government land. That is, the chiefs were the great konohikis and they used—they spoke of the “aina Alii.”

Q. Meaning the Crown Land?

A. Meaning the Crown Land, yes, Crown Land; but I have never heard the name konohiki applied to the Government lands. [124—56]

Q. Exactly. Now then, in addition to those three general classes of the large lands of the Territory, in what category falls the smaller lots awarded to the common people?

A. We had at this time Judge Lee, Judge Robertson, Mr.—there were others, who were doing their

(Testimony of Joseph S. Emerson.)

work to get the land into the hands of the common people, to the individual who had hitherto owned no right in his own land; it could be taken from him. Judge Lee, being the chief man in the case, did his best to bring the lands that they had been occupying and been cultivating into their possession, and he—

Q. How was that accomplished?

A. There was a raft of surveyors—

Q. I don't mean into details, but through what official body or organization was this division to the common people made?

A. Through the—I forget the title, name—

Q. Land Commission?

A. The Land Commission; through the Land Commission. The claims of a particular person—the claim of a particular person was brought before them, it was examined into and if accepted this person was given a title to that land.

Q. And those—

Mr. LIGHTFOOT.—I didn't catch quite distinctly the question.

The COURT.—That it was given, awarded.

The WITNESS.—It was awarded.

Mr. LIGHTFOOT.—I got the answer and I didn't get the question.

The WITNESS.—The title was awarded.

(Question of Mr. Robertson read by reporter as follows: "I don't mean in details, but through what official body or organization was this division to the common people made?")

Mr. ROBERTSON.—Q. These smaller lots that

(Testimony of Joseph S. Emerson.)

were awarded to [125—57] the common people were called kuleanas? A. Kuleanas.

Q. And the official instrument which evidenced the award of a kuleana was called the Land Commission Award, was it not?

A. Yes, Land Commission Award.

Q. Now if, Mr. Emerson, a Land Commission Award of a kuleana should describe the kuleana as bounding on or being contained within the “kono-hiki land,” what would that indicate as to the nature of the land upon which the kuleana bounded or was surrounded, as the case may be?

A. So far as my knowledge extends, and acquaintance with such cases, I should at once assume that it was not Government, because if it were Government “Aupuni” would have been placed there. I think it must have been a—one of the chiefs or persons who had bought—who had come in possession of the land; that is, some private owner.

Q. Or the chief may have obtained it through the Mahele that you have referred to?

A. Through the Mahele.

Q. Yes.

A. It had come into private possession either through the Mahele or by purchase.

Q. So that—

A. For instance, if a man had purchased of the Government and had become the suzerain, the lord, of that land, I should consider—I understand that he was the konohiki, the owner?

Q. Yes.

(Testimony of Joseph S. Emerson.)

A. Though the word “konohiki” has been used, for instance in Waialua, as the person—the overlord who represented him. Now, for instance—
[126—58]

Q. That is the man in the immediate charge?

A. The man in charge. For instance, Victoria Kamamalu, who owned very largely in Waialua, and under her was Laanui, and, afterwards, Kuokoa. Now, I was not so much acquainted during Laanui’s life, but under Kuokoa; Kuokoa was the konohiki but he was not the owner; he represented the owner; he was the man in charge.

Q. Yes, that’s all right. Now, if an award of a kuleana—No, if, in the award of a kuleana, the description of a kuleana says that it is surrounded by Aupuni, that would indicate that that kuleana was—

A. Surrounded or had been—

Q. Government land?

A. Had been a part of the Government land and was surrounded by land that still remained Government land.

Q. Yes, and if, on the other hand, it was described as situated within konohiki land, that would indicate that it was situated within land not Government land?

A. That is the way I should understand it.

Cross-examination.

By Mr. LIGHTFOOT.

Q. Mr. Emerson, you are familiar with Andrews’ Hawaiian Dictionary, are you? A. Yes.

Q. Do you consider Mr. Andrews an authority

(Testimony of Joseph S. Emerson.)

on the Hawaiian language? A. Not always.

Q. Not always? A. Not always.

Q. The definition—I will read the definition as given by [127—59] Mr. Andrews of the word “konohiki”: “konohiki. substantive. The head man of an ahupuaa. 2. A person who had charge of a land with others under him; o ka mea ai aina, he konohiki ia.” Do you consider that a proper definition of the word “konohiki,” Mr. Emerson?

A. It is a fairly good—

Q. Fairly good?

A. —statement of the meaning of the word “konohiki.”

Q. Are you familiar with a paper on the history of Hawaiian Government surveys with notes on land matters in Hawaii by Curtis J. Lyons, assistant—are you?

A. I have read it. I was familiar with it; I have not looked at it for some time.

Q. Would you consider that Professor Lyons was an authority on ancient Hawaiian land matters?

A. I think so.

Q. On page 28 of that paper as printed by the Hawaiian Gazette Co. in 1903, I find this “The second feature”—I have to go back. Cross that out. “These different pieces are called variously either by their own individual names or by that of the whole ili, thus puzzling one sadly when attempting to obtain information with respect to them. The second feature is referred to in the word ‘ku,’ short for ‘ili kupo.’ There were two kinds of ili, the

(Testimony of Joseph S. Emerson.)

ili of the ahupuaa and the ili kupono"—

A. Kupono.

Q. Kupono. "The ili of the ahupuaa was a subdivision for the conveyance of the chief holding the ahupuaa, ili ai ahupuaa. The konohikis of those divisions were only the agents of the said chief, all the revenues of the land included going to him and the said land, in Hawaiian parlance, 'belonging to the ahupuaa'." [128—60] What would you say of that definition as given by Lyons of konohiki?

Mr. ROBERTSON.—I object to that as irrelevant and immaterial, what Professor Lyons is writing about there now is ilis. No evidence that Kioloku was an ili.

(Argument.)

The WITNESS.—I should like to look at that statement in order to see just what it means.

Mr. LIGHTFOOT.—Showing the witness the pamphlet to which I have referred, on page 28 (Showing witness). The last part of this paragraph here.

A. That is, the ili kupono?

Q. Ili kupono.

A. I consider Mr. Lyons as a very high authority.

Q. Yes, and that is correct— A. I think—

Q. —According to your idea?

A. I think that I shouldn't object to what Mr. Lyons says here.

Mr. LIGHTFOOT.—I will offer this pamphlet in evidence.

Mr. ROBERTSON.—We object as irrelevant and

(Testimony of Joseph S. Emerson.)

immaterial. We do not dispute what has been read into the record here.

Mr. LIGHTFOOT.—All right, I will withdraw the offer, then.

The WITNESS.—I think it would be presumption on my part or on the part of any person living in the Hawaiian Islands at the present time to say that he knew more about it than Mr. Lyons. Mr. Lyons was high authority.

Mr. LIGHTFOOT.—Q. As a matter of fact, Mr. Emerson, in the last analysis, is there not, in the word “konkhiki” the basic idea of agency for another?

A. The word “konohiki,” as I have just said a little while [129—61] ago, in my childhood, when Hawaiian was the common language of the place, and English was only spoken by a few—referred in Waialua to such a man as Kuokoa, who represented the owner; he was the agent of the owner.

Q. Yes.

A. And Laanui, as I said, who was the konohiki; so that the word “konohiki” represents the acting—agent acting for the owner.

Q. Yes, quite so.

The COURT.—Why is the land itself called “Konohiki,” when it is held—I will leave it there. Well, why is the land itself called “Konohiki”? I understand “konohiki” means agent or—that is, the individual; now, why is the land called “Konohiki”? A. This term, “konohiki land”?

Q. Yes.

(Testimony of Joseph S. Emerson.)

A. After discussion of it now, "konohiki land," as my association of it goes, is the land owned by a person who has that land as distinguished from general land, which is the Government land. That is my association of the idea. If I were—If the—you ask a man, "To whom does that land belong"? "To the konohiki." A konohiki had the feudal rights, and it is coming back—coming down from the old feudal times. As an example, the free fishing on the Government lands, but on the konohiki lands, in the olden times, in my childhood, the konohiki could forbid fishing, and getting this particular fish. (Speaks in Hawaiian.) "Konohiki, it is konohiki part, but the other is aina aupuni; that's all right, you can fish there." Individual ownership as distinguished from the collective ownership of the Government was the association of idea in my mind as I heard it used in my childhood. [130—62]

Mr. LIGHTFOOT.—Q. The land, then, I understand, Mr. Emerson, in ancient times, in the way it was held by a person as the agent for another, was said to be konohiki land, is that right?

A. Yes.

Q. Now, prior to the Great Mahele of 1848, you have said that all the land belonged to the king; that is—

Q. —a fair statement of it?

A. All rights were derived—

Q. From the king? A. From his will.

Q. Yes. In a broad sense, it may be said that all

(Testimony of Joseph S. Emerson.)

lands belonged to the king? A. Yes.

Q. Really to the king and chiefs—

A. Yes.

Q. —according to the constitution of 1840. Now, the king didn't personally administer the individual lands? A. Not at all.

Q. He had other people to care for them, did he not? A. Yes.

Q. I am speaking of the time now, before the Great Mahere. A. Yes.

A. What were those people called?

A. Konohiki.

Q. Konohiki; so that, before the Great Mahele, the custodian under the king of an ahupuaa was called a konohiki? A. Yes.

Q. Now, it was not until after the Great Mahele and after the establishment of the Land Commission to quiet titles to land [131—63] that there came into use the definitions of the three kinds of lands under which Kamehameha the Third had divided his kingdom? A. I believe so.

Q. Those lands, which were set apart for the purposes of the Government were called—

A. Aina aupuni.

Q. Aina aupuni. They were subdivided into school lands, and fort lands, were they not?

A. Yes.

Q. Aina aupuni; and in descriptions generally, after the land commission began to make its awards, the descriptions generally, referring to lands as "Aina aupuni," referred to Government land?

(Testimony of Joseph S. Emerson.)

A. To Government lands.

Q. Aina aupuni? A. Yes, sir.

Q. Now, Crown lands were called "Lei Alii," "Aina Lei Alii"? A. "Lei Alii," yes.

Q. And those that were set apart for the people, approximately one-third, were called "konohiki," land, is that right?

A. The konohiki lands were the konohikis—they were chiefs.

Q. They were chiefs?

A. Chiefs, as distinguished from the king.

Q. Yes.

A. Some of the chiefs had great possessions, and it was not Lei Alii that—for instance, Ruth Keelikolani owned the land in many cases, not because she wasn't the—she wasn't an alii, and it wasn't hers as an alii,—as the king—the supreme ruler,—but as a chief. [132—64]

Q. I see. Now, prior to the Great Mahele, there were many surveys of lands, were there not? There were surveyors here prior to the mahele of 1848?

A. I am not familiar with any particular land just now, that was surveyed. I won't say it was not so.

Q. Yes, I see; I don't—

A. The surveys were very rude, extremely rude.

Q. Rude? A. Extremely rude, yes.

Q. Yes.

A. The introduction of surveying instruments was largely, as my recollection goes, through Judge Lee. Of course, there were—I don't say that there were

(Testimony of Joseph S. Emerson.)

not before, but when the pa-nana was introduced into the Hawaiian Islands it was largely Judge Lee's work in securing so many—

Q. I see. Now, prior to the Great Mahele, those who were in charge under the king, being called "konohiki," didn't their description as "konohiki" continue to extend beyond the Great Mahele and the awards of the land commission; that is to say, prior to the Mahele and survey, the owner of land under the king was known as "konohiki," and afterwards didn't that appellation of "konohiki" still attach to him, so that he was afterwards called, and perhaps, strictly, wrongfully called "konohiki"?

A. I have no case in mind.

Q. You have no case in mind?

A. Where that was the case.

Q. I see.

A. I don't want to absolutely say it was not so or that it was so.

Q. Are you familiar with the Ahupuaa of Waihinu? [133—65] A. I am.

Q. What is that?

A. Waiohinu is an ahupuaa in Kau, Hawaii.

Q. Yes.

A. I don't mean to say that I am acquainted with its boundaries.

Q. No, no. You know that it is Crown Land?

A. I have lived there.

Q. Yes.

A. I have lived there, and I was acquainted with the land.

(Testimony of Joseph S. Emerson.)

Q. Are you— Can you say now that it was Crown land—that it is Crown land, Government land or konohiki land?

A. I don't know; that comes—that didn't come up; it was before I was a surveyor that I was living there. My stay there had nothing to do with surveying, and I was purely working under C. N. Spencer, connected with sugar, and my knowledge of things at that time was not that of a surveyor.

Q. I show you map of Kau, Hawaii—

A. Kohala?

Q. No, Kau, Hawaii, from Punaluu to Kalae, from surveys by M. D. Monsarrat, J. S. Emerson— You are the J. S. Emerson? A. Yes.

Q. F. S. Lyman. May by F. S. Dodge, 1894, being Government Register Map No. —, being Registered Map 1807; and ask you to— Would you mind stepping down and looking at this, please? Do you recognize this map, sir? A. Yes.

Q. Just look at the Ahupuaa of Waiohinu.

A. Here.

Q. Yes, Waiohinu. Can you tell by looking at that land, [134—66] referring to the original, whether it is Crown land or Government land, or konohiki land?

A. I would say about this that my work in connection with this part of the country was purely geodetic; it had nothing to do with determining the ownership of this land; that was done by other members of the survey.

(Testimony of Joseph S. Emerson.)

The COURT.—Q. You did not deal with the boundaries there?

A. No, not there. I did in some cases, some other work, but not here. I had nothing to do with the boundaries; my work was purely geodetic, and if I should make a statement that this was such and such, I would have simply to report what others had investigated.

Q. You don't know of your own knowledge?

A. I do not.

Q. That Waiohinu is, in fact, Crown land?

A. No, no, I am not—would have to simply take the authority of the map, and I was not responsible for that feature of the map.

Mr. LIGHTFOOT.—Q. Let me ask you this question: If a kuleana should be located within an ahupuaa which was Crown land, would its boundaries within the ahupuaa be correctly described as “konohiki.” A. If it was Crown?

Q. Crown, yes.

A. I can't say that it would not be.

Q. Can't say that it would not be.

The COURT.—Q. What would be the usual, the ordinary way of describing the boundaries of a kuleana so situated?

A. I think that the term kuleana—I think the term konohiki could be used.

Q. I am speaking of the ordinary, usual method of describing the boundaries of a kuleana so situated; would you say “konohiki”? [135—67]

Mr. ROBERTSON.—I object to this line of evi-

(Testimony of Joseph S. Emerson.)

dence, if the Court please, on the ground that it is immaterial and irrelevant, owing to the fact that the Government here is not claiming this as crown land and never has. They came into court claiming this was an unassigned land, and, therefore, by operation of law, the title of the land remained in the Government.

The COURT.—I will permit the question.

Mr. LIGHTFOOT.—Q. Now, what I should like to have is an answer to the Court's last question. Have you got that? If you recall the question, otherwise it may be read to you.

A. The question was, what would the term usually be used?

The COURT.—Q. Yes, if that kuleana was situated within the boundaries of crown land.

A. I confess I am unable to answer that question through ignorance. I don't—I am not sure of any particular case. I haven't had anything to do particularly that would entitle me to make a positive answer one way or another.

Mr. LIGHTFOOT.—Q. Do I understand, Mr. Emerson, that when you speak of your familiarity with the word "konihiki" you mean that are only familiar with the use of that term as relating to the ownership of private individuals, and as to any ownership as an agency of the Government you know nothing?

A. I don't know of the term konohiki having been applied to the representative of Government owner-

(Testimony of Joseph S. Emerson.)

ship in the olden time. I am speaking of the early youth of the term.

Q. I should like to call your attention, Mr. Emerson, to map, Hawaiian Government Survey, Walter E. Wall, Surveyor, Government lot in Puueo, Kau, Hawaii, J. S. Emerson, Surveyor, being Registered Map No. 2197, and to call your attention to the Ahupuaa of [136—68] Puueo. Will you examine this map, please? You made that survey, did you not? A. Yes.

Q. Now, looking at the Ahupuaa of Puueo, I will ask you whether that is Government land?

Mr. ROBERTSON.—We object to the question as irrelevant and immaterial, if the Court please. It doesn't appear that Puueo was an adjoining land to Kioloku.

Mr. LIGHTFOOT.—This is what I want to get at,—not as referring particularly to any particular piece of land or trying the title to it, but on the question of whether or not there are awards and surveys of kuleanas withing Government lands which have the boundaries given as konohiki, and for that purpose we offer to show that this Government land of Puueo has within it certain kuleana or kuleanas which have the boundaries within the Government land described as konohiki, as controverting the position taken by my learned friend that that indicates a private ownership of land.

(Argument.)

The COURT.—I will permit the question. That

(Testimony of Joseph S. Emerson.)

is, assuming that it is Government land?

Mr. LIGHTFOOT.—Yes. I think Mr. Emerson said it was Government land.

The WITNESS.—I say that the map shows that I said it was Government land. I have forgotten entirely about it; my mind has been off this business now for a great many years, and I do not remember anything except the fact that I have got my name there and I was satisfied then with what I put down.

Mr. LIGHTFOOT.—Yes.

A. I am entirely forgetful during the past years of a great [137—69] many things that I knew then.

Q. And of course—

A. And I simply say that if my name is down there, I stand by it, that it was honest work.

Q. And that's all you know about it?

A. That's all I know about it, now.

Q. You don't know, then, as a matter of fact, and can't tell from an examination of this map, whether Puueo is Government land or not, is that true?

A. I only can tell by refreshing my memory by what I have put down there.

Q. Yes. Now, will you try and—

A. It says here it was a Government lot in Puueo. Now, here's a Government remainder and here is a—

The COURT.—I think, Mr. Lightfoot, before the question on cross-examination has any pertinency

(Testimony of Joseph S. Emerson.)

or any force it ought to appear that the land is Government land.

Mr. LIGHTFOOT.—I think so. I am trying to establish that fact now.

The WITNESS.—I stand by my map, that it was an honestly made map and that I put down the facts, and my only knowledge about it is what the map reveals now, because otherwise, other than that, I have forgotten all about it.

Mr. LIGHTFOOT.—Q. That's right, exactly, but, Mr. Emerson, looking at the map now, that you believe to be correct— A. Yes, sir, certainly.

Q. — you can't say—or can you say that Puueo is therein described as a Government land?

A. I said here it was a Government lot in Puueo, Now, I have put down this as Government— [138—70]

Mr. ROBERTSON.—What do you mean by “this”? When you said “this” you pointed to a piece of land designated Puueo, remainder 130.5 acres, didn't you?

A. I was pointing to this and saying—

Mr. ROBERTSON.—I know, but when you say “this” that confers nothing to the record. The reporter doesn't get what you point at.

The WITNESS.—No. Excuse me.

Mr. ROBERTSON.—What did you point to when you used the word “this”?

A. I pointed to Government remainder—I was pointing to what is Government remainder. Now, the details of this have quite passed from my mind,

(Testimony of Joseph S. Emerson.)

so that I can only say that this was an honest piece of work and that I have gone into other things and that I wouldn't want to make any statement more than this, that the map was accepted as a correct map and was made with honest intent. Now—

Mr. LIGHTFOOT.—Q. Mr. Emerson, that isn't the question. No one is disputing the accuracy or the honest intent with which the map is executed; the only thing, the only question now before the Court is, I want to show,—and from you if I can, if not I can do it from other sources,—that the land of Puueo was Government land; that's the only thing the question is— From the examination of that map, can you say whether it was Government or not?

A. That is, the whole land, originally?

Q. Yes.

A. It would seem so. That would seem to be the fact, but my memory of the facts has entirely passed; I haven't thought [139—71] anything about these things—

The COURT.—Q. The question is, what does the map show, Mr. Emerson? To pick that map up what would you say as to whether that was Government land? Not only that you made it? But any other surveyor would pick it up, what would he say?

A. I should say that it was—it had been Government land and that a part of it had been sold and this was what remained to the Government. That is, it would seem to indicate that the whole

(Testimony of Joseph S. Emerson.)

land was originally—that it was Government land; otherwise I shouldn't—I don't know why it could have been called a Government remainder, unless the whole of the land—

Mr. LIGHTFOOT.—Q. Now, then, the map is described as a Government lot in Puueo, Kau, Hawaii? A. Yes.

Q. Now, the land to which this has particular reference is described, is it not—is included, is it not, within the green lines? Is that green or blue? Green lines. A. Yes.

Q. So the portion of this map included within the green lines is a piece of land situate within the Government lot, within Government land?

A. I should say so.

Q. Is that true? A. I should say so.

Q. Now, could those boundaries, then—could the boundaries of that land, then, be described as konohiki?

Mr. ROBERTSON.—Objected to as incompetent, irrelevant and immaterial.

Mr. LIGHTFOOT.—Q. Or Aupuni?

Mr. ROBERTSON.—Irrelevant and immaterial, if the Court please, [140—72] absolutely vague and too general.

The COURT.—I think the objection is well taken. The question is, looking at the kuleana there, how are the boundaries designated? The question is, how are they actually designated?

Mr. ROBERTSON.—Furthermore, I have the further objection, your Honor, it is not proper

(Testimony of Joseph S. Emerson.)

cross-examination, if the Court please.

Mr. LIGHTFOOT.—This is our effort; the effort is to show that here is a kuleana within the Government land of Puueo in Kau, where the boundaries of the kuleana are given as konohiki when, as a matter of fact, they bound—they face on Government land.

The COURT.—You might do that with your own testimony.

(Argument.)

I think the objection is well taken.

Mr. LIGHTFOOT.—Q. Mr. Emerson, you used the expression, referring to the surveyors, on your direct examination, I understood you to say,—correct me if I am wrong,—“there were a raft of surveyors”? A. I used that expression.

Q. Mean a— A. Great number?

Q. Eh? A. A great number.

Q. Yes. Now 1848—

Mr. ROBERTSON.—I didn't understand him to say there was a raft of surveyors in 1848.

The WITNESS.—I used that expression.

Mr. LIGHTFOOT.—Q. There was a raft of surveyors used about [141—73] the time of the Mahele?

A. After the Mahele, when the kuleanas were being surveyed.

Q. That would mean that, say, from February the 14th, 1846, up to the sixties?

A. And particularly, say, when the land—when the kuleanas were being surveyed. Not so much to

(Testimony of Joseph S. Emerson.)

larger lands. The—Judge Lee and Judge Robertson, the father of the present Judge, and those who were seeking to get the land into the hands of the Hawaiian people before the death of those who were in favor of it, and before, for instance, Kamehameha Fifth should get in, they were earnest in their efforts to get the land surveyed. They got anybody that called himself a surveyor—

Q. That's right—

A. Anybody that called himself a surveyor. Some of these surveyors were entirely ignorant of surveying, and some knew more about it.

Q. I see.

A. It was a piece of work humanitarian in its object to get the land into their hands just as soon as possible. Consequently I used that word "raft" in that way as indicating that they secured a large number, some of whom were qualified and some were entirely unqualified.

Q. Yes, that's right; that's what— Then, by the use of the word "raft" of surveyors you not only mean to testify that there were a good number of surveyors, but they were not surveyors who were—who had professional training? A. Yes.

Q. As a matter of fact, there were quite a number of young men came from—let me see—Lahainaluna, was that turning out surveyors then?

A. Yes. It was more in particular in reference to absolute [142—74] ignorance of some of Hawaiian matters at all. Those that came from Lahainaluna, as a rule, showed considerable pains in their work.

(Testimony of Joseph S. Emerson.)

I have known Kalama and Ua and various others there, their testimony goes to some pains, but when you take some of those people who didn't know anything of those things it was very much the reverse.

Q. Yes, I see, but it was a question almost of "any port in a storm," to get any man to make a survey, whether he was thoroughly competent or not?

A. Yes.

The COURT.—How does it help us with the boundaries?

Mr. LIGHTFOOT.—We wish to show, may it please the Court, that when a man used—that when these surveyors used the words "konohiki" or "ke aupuni," they were not always clever enough to know what their words actually imported.

Mr. ROBERTSON.—Why doesn't counsel ask the witness in reference to the surveyor who surveyed this kuleano, then?

(Argument.)

Mr. LIGHTFOOT.—I want to show that the class of men that were employed generally for that work at that time were as the professor says.

Mr. ROBERTSON.—I move if the Court please, to strike out all questions and answers in this connection with reference to the incompetency of certain surveyors who did survey work in the early days here without reference to any survey that is in evidence in this case. It is absolutely unfair to put into evidence here a general statement that a whole raft of incompetent surveyors were employed to

(Testimony of Joseph S. Emerson.)

make surveys of kuleanas.

(Argument.)

The COURT.—The motion to strike out will be granted. It [143—75] is stricken out accordingly.

Mr. LIGHTFOOT.—Q. Do you know J. Fuller?

A. I do.

Q. Did you know J. Fuller? A. Yes.

Q. What would you say of his ability?

A. I should say that, having gone through scores of his surveys, I consider him the very best surveyor of the time; even C. J. Lyons, who commenced work at sixteen years old, don't rank—as a youth; he made a very fine surveyor,—but at the time when that man Fuller, ranked even higher than C. J. Lyons, and that is the highest praise I can give any surveyor in the Hawaiian Islands.

Mr. ROBERTSON.—You contend Fuller made this survey, do you, Mr. Lightfoot?

Mr. LIGHTFOOT.—No.

The WITNESS.—Mr. Fuller was editor of a Hawaiian newspaper—

Mr. ROBERTSON.—Mr. Kanananui was bowing his head and saying yes, and you say, no.

Mr. LIGHTFOOT.—Mr. Kanananui said, “I think by Fuller.” I haven't any knowledge if it.

Mr. ROBERTSON.—Kanakanui said yes, Fuller did make the survey.

(Testimony of Joseph S. Emerson.)

Mr. LIGHTFOOT.—Now, knowing that it is true, we will admit it.

Mr. ROBERTSON.—Let's play fair here.

Mr. LIGHTFOOT.—We are playing fair. It was made by Fuller.

The WITNESS.—Mr. Fuller was editor of a Hawaiian newspaper sometime during his life, and, as a surveyor, I have been over scores of his surveys and I unequivocally say that I rank him as the best surveyor in the Hawaiian Islands at that time [144—76] when he was surveying.

The COURT.—Now do I understand that this land in question was surveyed by him?

Mr. ROBERTSON.—The kuleana within the—

Mr. LIGHTFOOT.—The kuleana within Kioloku was made by him. That's all, Mr. Emerson.

Redirect Examination by Mr. ROBERTSON.

Q. Just a minute. You have been examined on cross-examination here at great length, Mr. Emerson; is there anything, any answer you may have given on cross-examination that was intended to qualify the statement previously made by you that the word "konohiki," as designating a class of land, could not properly be used as designating Government land?

Mr. LIGHTFOOT.—I object to that. That is not proper redirect.

The COURT.—Objection is overruled.

The WITNESS.—Shall I answer that question?

The COURT.—You may answer the question.

(Question read by reporter.)

(Testimony of Joseph S. Emerson.)

A. I think I have no change to make there. The statement is— The idea that I wished to convey was that there was Government land it was used—the term *aupuni* was used, and that I always understood *konohiki* to mean other ownership than *aupuni*. I still stand by that statement.

MR. ROBERTSON.—Q. Yes; in other words, the word *aupuni* on one side and the word *konohiki* on the other side were terms used to differentiate between two different classes of land?

A. That's the way I understood it. [145—77]

Q. Yes. Now, by way of illustration, Mr. Emerson, as shown by this map here, lying on the north side of the land of *Kioloku* is the *Ahupuaa* of *Honuapo*, awarded by Land Commission Award 8559B, *Apana* 13, to W. C. Lunalilo. Is it not a fact that, upon that award to Lunalilo, Lunalilo would thereby become and be properly designated as the *konohiki* of *Honuapo*?

A. According to usage.

MR. LIGHTFOOT.—We object to this as not proper redirect.

THE COURT.—Objection is overruled.

MR. ROBERTSON.—Q. In other words, that, whereas, prior to the *mahele*, the word "*konohiki*" had been used to designate the man in charge of a certain land, after the *mahele* and the award of private titles, the word then was used to designate the awardee of the *ahupuaa*, is that not right?

A. It was used to designate the man who owned

(Testimony of Joseph S. Emerson.)

it, whether it came by purchase or by award—by the mahele.

Q. At any rate the land which had—the title of which had come into private ownership?

A. Yes.

Q. Mr. Lightfoot showed you that pamphlet of C. J. Lyons on the subject and referred you to a passage in it. As I understand that passage, and I think you said, but I am not sure, the statement of Mr. Lyons there was with particular reference to the ownership of ilis, was it not?

A. I believe so.

Q. And Mr. Lyons in that paragraph discusses somewhat the difference between a plain ili and an ili kupo? A. Yes.

Mr. ROBERTSON.—That's all.

Mr. LIGHTFOOT.—That's all. [146—78]

**Testimony of George F. Wright, for Respondent
(Recalled).**

GEORGE F. WRIGHT, a witness on behalf of contestant or respondent, being recalled for cross-examination, testified as follows:

Cross-examination.

(By Mr. LIGHTFOOT.)

Q. In your examination of Hawaiian surveys, Mr. Wright, you have stated on your direct examination that you have found the word “konohiki” to represent private ownership? A. I did.

Q. Have you ever, in your examination of old surveys, found the word “konohiki” used as a

(Testimony of George F. Wright.)

boundary where the boundary was not on privately owned lands? A. I have.

Q. On one occasion or many occasions?

A. On many occasions.

Q. And referring both to crown lands and Government lands? A. Yes, sir.

The COURT.—Q. That is, if a kuleana was situated within any crown lands or Government lands, its boundaries would be designated as “konohiki”?

A. There are cases.

Q. There are cases?

A. There are cases.

Mr. LIGHTFOOT.—Q. Are you familiar with the Ahupuaa of Waiohinu? A. I am.

Q. What is that? A. Crown land.

Q. Crown land. Do you know if there are any surveys made of [147—79] kuleanas within Waiohinu which give their boundaries on the Ahupuaa of Waiohinu as “konohiki.” A. I do.

Q. Are there? A. There are.

Q. There are? Do you know the land of Puueo?

A. That is—

Mr. ROBERTSON.—Objected to as irrelevant and immaterial, and not proper cross-examination.

The COURT.—I presume this is preliminary to showing they are situated within?

Mr. LIGHTFOOT.—Yes.

Mr. ROBERTSON.—Puueo is that land which counsel attempted to cross-examine Mr. Emerson on which the Court has stricken out.

;(Argument.)

(Testimony of George F. Wright.)

The COURT.—I think the objection is well taken.
(Objection sustained.)

Mr. LIGHTFOOT.—That's all, Mr. Wright, thank you.

The COURT.—Understand me, I am not ruling that you may not show these through him, but I say that is a possibility that may be a part of your case.

Mr. LIGHTFOOT.—I understand the ruling.

Redirect Examination by Mr. ROBERTSON.

Q. You say that the Ahupuaa of Waiohinu was a crown land? A. It is.

Q. Crown lands at the time of the Mahele were denominated the private lands of the king, were they not? A. They were [148—80]

Q. Yes, and were so treated? A. They were.

Q. Yes. In other words, that crown land ahupuaas had their boundaries settled in the same way that konohiki ahupuaas were settled?

A. They were.

Q. —were they not? Yes. And so that, as a matter of fact this Ahupuaa of Waiohinu, which you say is a crown land, did have its boundaries settled by the Commissioner of boundaries for that circuit just as the boundaries of Kioloku were settled before the commission?

A. The same thing.

Q. Yes. This is not true as to Government land?

A. Not in this district.

Q. Yes. Now you have said that you have seen cases where kuleanas within Government ahupuaas

(Testimony of George F. Wright.)

have had their boundaries designated as running along konohiki? A. I have.

Q. In those cases did you make any particular investigation as to the history of the ahupuaa to ascertain whether at some time or other there had been any question as to whether they were Government or konohiki ahupuaas?

A. The only way I can explain it, that previous to the Mahele all lands were practically konohiki and after the Mahele in 1847 it was not a matter of general knowledge as to what lands had been konohiki or what, so that the term was used, Land Commission Award—not knowing that the title had passed to the Government.

Q. That would be so where a surveyor was not well posted? A. It would.

Q. Or it would also be so if the surveyor had made an honest [149—81] mistake?

A. It would.

Q. Do you still adhere to your former statement that the term “konohiki” is not properly or correctly used with reference to Government land?

A. I do.

Mr. ROBERTSON.—That’s all.

Mr. LIGHTFOOT.—There is one question that I omitted to ask on cross-examination that I desire—

The COURT.—Very well.

Mr. LIGHTFOOT.—Q. Showing you the map that you last referred to yesterday afternoon, being a Government registered map, 1455, which was

spread out on the desk, I will ask you how that land was classified; how the land of Kioloku is classified on this map?

Mr. ROBERTSON.—We object to that as irrelevant and immaterial. The map is not in evidence. I obtained permission to use the map simply so that the witness would have a map large enough to show the boundaries of Waiohinu in reference to these boundaries he was then testifying about.

The COURT.—That is the way I understood it, that this was not evidence but merely as Judge Robertson said.

Mr. LIGHTFOOT.—If that is correct then I will put this in in another way.

Afternoon Session, Oct. 25, 1918.

Mr. ROBERTSON.—If the Court please, the Territory has produced, pursuant to my request made in open court the other day, a map of a section of the district of Kau on the Island of [150—82] Hawaii, showing ahupuaas, grants and unsold Government lands, compiled by F. S. Lyman in 1879, being a registered map in the archives of the survey department, numbered 575. It was my intention, and is my intention, to offer this map in evidence, provided the Court will take my view of a certain phase of it that I will now mention. This map shows a number of lands in that section of the Territory, including the land in dispute, Kioloku, and the adjoining and neighboring lands. Certain of these adjoining lands, take, for instance, the land of Hionaa, is designated on the map by the

maker of it as Aupuni or Government land. The designations of the Ahupuaas of Honuapo and Kioloku are not designated Government, this indicating private ownership, but someone has made a pencil notation, or some persons have made a number of pencil notations, on the face of this map, the notation on Kioloku being "834" acres. Of course no point is made about the area, but it is also noted here that "No Title" in lead pencil. Now, then, what that means is, perhaps, open to argument. It may mean that the Government has no title, or it may mean that the private claimant as of that date had no title; we don't know; but what we object to is the map going in as evidence with these pencil notations as a part of it. In other words, I contend I am entitled to offer in evidence this map made by Mr. Lyman in 1879, for the purpose of designating Government lands in this section of the country, as he made it and as it was filed and registered under its appropriate number. I contend that this map supports our contention in this case and I submit that our right to use it as evidence for our benefit in this case should not be defeated or impaired by virtue of the fact that somebody has made an unauthorized pencil memorandum on the face of it.

The COURT.—It is not signed or initialed by any person? [151—83]

Mr. ROBERTSON.—No, your Honor. There are a number of such notations in various parts of the map. I am not particularly interested in any

of them except the notation of the reference to the land in dispute; and I contend, therefore, that I am entitled to offer this map in evidence without it being regarded as a part of the map, this pencil notation on it.

Mr. LIGHTFOOT.—I submit, may it please the Court, that, in the absence of a showing that there has been a malicious mutilation of the map, the map should go in as it is, it being for either party to rely upon the map as it is. I don't know— Counsel is taking it for granted that that pencil memorandum is not part of the map as originally registered.

(Argument.)

We object to any exclusion of anything that appears on the face of the map.

(Argument.)

The COURT.—Well, I will admit the map. It seems to me clearly it was no part of the map at the time the map was made and finished.

Mr. LIGHTFOOT.—As long as the map goes in as it is, we have no objection.

Mr. ROBERTSON.—Well, you see, there is a ground of misunderstanding right there. We are not asking that the Government be compelled to erase this pencil memorandum, but I think we are entitled to the specific ruling from the Court that we are entitled to introduce this map as an exhibit and that the pencil memorandum appearing on it shall not be considered as a part of the exhibit.

The COURT.—With reference to the state of title at the time it was made?

MR. ROBERTSON.—Oh, with reference to anything. [152—84]

(Argument.)

THE COURT.—If your purpose is to show the condition of the title of the land at the time the map was made, the pencil memorandum is no part, and the mere making of the pencil memorandum shows it was subsequent to the completion of the map, because if it was intended that that be a part of the map it would have been made just the same as the other portion of the map; therefore, it follows, as a matter of reasoning, it seems to me, that it is clearly not a part of the map at the time the map was finished. That pencil memorandum would not change things as they existed at the time the map was made.

MR. ROBERTSON.—Well, I—I think I understand your Honor, then.

THE COURT.—As I understand, that is how you are trying to show the condition of things as they existed there in 1879, at the time the map was made?

MR. ROBERTSON.—Yes. Well, on that understanding, then, I offer this map in evidence.

MR. LIGHTFOOT.—We have no objection.

(Respondent's exhibit 10.)

MR. ROBERTSON.—If the Court please, we offer in evidence a certified copy of a deed of trust executed by K. Kapaakea and A. Keohokalole, his wife, to Charles R. Bishop, dated June 14th, 1860, recorded in registry of conveyance at Honolulu, in Book 13, pages 59 to 61.

(Testimony of Robert Parker, Jr.)

(Received in evidence and marked Respondent's Exhibit 11.) [153—85]

Testimony of Robert Parker, Jr., for Respondent.

ROBERT PARKER, Jr., a witness called on behalf of respondent, being first duly sworn, testified as follows:

Direct Examination by Mr. ROBERTSON.

Q. What is your name? A. Robert Parker, Jr.

Q. Where do you live? 889 Kanoa Street.

Q. Honolulu? A. Yes, sir.

Q. What is your position?

A. Assistant clerk of the Supreme Court.

Q. Of this Territory? A. Yes, sir.

Q. Have you brought with you, under subpoena, from the records of the Supreme Court, probate record No. 1839? A. Yes, sir.

Q. Have you it with you? A. Yes, sir.

Mr. ROBERTSON.—Now, Mr. Lightfoot; unless this whole mass of stuff is going in, we better get together on such portions of it—

Mr. LIGHTFOOT.—Will you state, Judge, what you want; wouldn't the best way—I make this suggestion, that counsel will state what he wishes to prove from these records, quoting them, if necessary, and I will state what I wish to prove from the records. Of course, I rely on those records; and we can let the thing go in without the records, as it seems to me.

Mr. ROBERTSON.—I think we can get at it that way. It has been the purpose of both counsel

here not to fill up the record here with a lot of chaff. [154—86]

The COURT.—I understand these to be photographic copies, certified copies?

Mr. ROBERTSON.—Photographic, yes.

Mr. LIGHTFOOT.—These are receivable in evidence under the statute.

The COURT.—Yes.

Mr. ROBERTSON.—I want to show by this record that Kapaahea, who was sometimes called Caesar Kapaahea, but in Hawaiian his initial is K, there being no C. in the Hawaiian language,—C. or K. Kapaahea died on the 13th of November, 1866, intestate.

Mr. LIGHTFOOT.—That is admitted.

Mr. ROBERTSON.—That J. O. Dominis and Annie Keohokalole, the decedent's widow, were appointed administrator and administratrix of the estate.

Mr. LIGHTFOOT.—That is admitted.

Mr. ROBERTSON.—On January 19th, 1867.

Mr. LIGHTFOOT.—That is admitted.

Mr. ROBERTSON.—That is the date shown in the record.

Mr. LIGHTFOOT.—Yes, that's admitted.

Mr. ROBERTSON.—That before the administration of the estate was closed, Annie Keohokalole died, the date of her death being April 6th, 1867.

Mr. LIGHTFOOT.—April 6th, 1869. May we verify that? I may be in error.

Mr. ROBERTSON.—Sixth day of April, 1869.

Mr. LIGHTFOOT.—We will admit that she died on that date.

Mr. ROBERTSON.—And that J. O. Dominis was appointed administrator of her estate on the 27th of May, 1869.

Mr. LIGHTFOOT.—Yes, we admit that.

Mr. ROBERTSON.—That J. O. Dominis, as such administrator, on [155—87] the 13th of September, 1870, filed his final account and petition for discharge as such administrator.

Mr. LIGHTFOOT.—Petition of Dominis for discharge—I haven't got that date, but what date do you give?

Mr. ROBERTSON.—My memorandum says September 13th, 1870.

Mr. LIGHTFOOT.—We will also admit.

The COURT.—If the date is not material, why—

Mr. LIGHTFOOT.—It has some bearing on it, but we will admit it. I know it was about that time.

Mr. ROBERTSON.—That the petition alleged, *inter alia*, that all the real estate remaining and to which the heirs of the deceased were entitled has been partitioned by the heirs of the deceased and the deed of partition duly recorded in the office of the Registrar of Conveyances.

Mr. LIGHTFOOT.—That is admitted.

Mr. ROBERTSON.—And that the order of Court approving the accounts and granting the discharge makes similar reference to the partition of the real estate among the heirs of A. Keohokalole.

Mr. LIGHTFOOT.—It is so admitted, your Honor.

Mr. ROBERTSON.—That the account of J. O. Dominis as administrator shows, as the first item of receipt of money, receipt of a balance of an account from C. R. Bishop, trustee, of \$226.14, being the balance remaining in the hands of Bishop as such trustee. On June 5th, 1869. That is admitted, isn't it?

Mr. LIGHTFOOT.—That is admitted.

Mr. ROBERTSON.—That the account of Charles R. Bishop, trustee of the estates of Kapaaakea and Keohokalole are a part of the record in the probate court.

Mr. LIGHTFOOT.—They were filed there; I don't know that [156—88] there was any order receiving them in evidence, but they were filed with the papers and are among the records. We will so admit.

The COURT.—That will make it a part of the record, won't it?

Mr. LIGHTFOOT.—A part of the record.

Mr. ROBERTSON.—That is satisfactory.

Mr. LIGHTFOOT.—I don't know if they have the filing mark, but they are with the papers.

Mr. ROBERTSON.—Yes. Well, if there is any question about it, I submit they are connected up with the amount shown by the administrator as being the balance received by him, which corresponds with the balance shown by Bishop's account, showing it is the account or goes to make up the balance that he turned over to the administrator.

The COURT.—It seems to me that would be sufficiently clear.

Mr. ROBERTSON.—Perfectly clear to me. I don't know what's the matter.

Mr. LIGHTFOOT.—There is the indorsement at the end of the Bishop account, as I remember it, "C. R. Bishop account as trustee of the estate of"—There is no filing mark of the Court.

The COURT.—Q. Well, this photograph doesn't show the filing mark, does it? A. Yes, sir.

Mr. LIGHTFOOT.—We admit that it is in—among the records of the case.

Mr. ROBERTSON.—That Mr. Bishop's account shows, under date of April 9, 1861, the receipt from W— the receipt from Thomas Martin for on year's rent for Kioloku, Kau, Hawaii, fifteen dollars.

Mr. LIGHTFOOT.—It is so admitted. [157—89]

Mr. ROBERTSON.—The same account shows, under date of January 25th, 1862, receipt of rent from—no, the receipt from W. T. Martin for six months' rent of Kioloku to December first, 1861, ten dollars.

Mr. LIGHTFOOT.—So admitted.

Mr. ROBERTSON.—The same account shows, under date of July 8, 1862, the receipt from W. T. Martin for six months' rent to June first for Kioloku, ten dollars.

Mr. LIGHTFOOT.—To June first of what year?

Mr. ROBERTSON.—Doesn't state. Admitted?

Mr. LIGHTFOOT.—Yes, that is admitted.

Mr. ROBERTSON.—The same account shows, under date of November 26th, 1862, the receipt

from cash—receipt from W. T. Martin for six months' rent to December first—62, for Kioloku, ten dollars.

Mr. LIGHTFOOT.—Admitted.

Mr. ROBERTSON.—That the same account shows, under date of July 2, 1863, the receipt from W. T. Martin six months' rent to June first for Kioloku, ten dollars.

Mr. LIGHTFOOT.—Admitted.

Mr. ROBERTSON.—The same account shows, under date of November 5, 1863, receipt from W. T. Martin, six months' rent to December 1—63, for Kioloku, ten dollars.

Mr. LIGHTFOOT.—Admitted.

Mr. ROBERTSON.—The same account shows, under date of June 11, 1864, the receipt from W. T. Martin, rent of Kioloku six months to first inst. ten dollars.

Mr. LIGHTFOOT.—Admitted.

Mr. ROBERTSON.—That the same account shows, under date of November 21, 1864, receipt from W. Thomas Martin rent for Kioloku six months to December 1—64, ten dollars. [158—90]

Mr. LIGHTFOOT.—Admitted.

Mr. ROBERTSON.—That the same account shows, under date of July 22, 1864, receipt from W. T. Martin, rent Kioloku six months to June first ten dollars.

Mr. LIGHTFOOT.—Admitted.

Mr. ROBERTSON.—Same account shows, under date of February 8, 1865, receipt from W. Thomas

Martin rent Kioloku six months to December 1—65, ten dollars.

Mr. LIGHTFOOT.—Admitted.

Mr. ROBERTSON.—That the same account shows, under date of August 20, 1866—I am wrong there. Last one in 1864, Nov. 21, 1864, July 22, 1865, ten dollars.

Mr. LIGHTFOOT.—That's right.

Mr. ROBERTSON.—February 8th, 1866, it should be, ten dollars. That is to December 1st, 1865. Then August 20th, 1866, receipt from W. Thomas Martin rent of Kioloku six months to first June, ten dollars. Admitted?

Mr. LIGHTFOOT.—Admitted.

The COURT.—Is this for the entire piece or just a portion of it, or does it appear?

Mr. ROBERTSON.—Kioloku means the whole if it means anything. Under date of December 27, 1866, receipt from W. T. Martin, rent Kioloku, six months to December 1—66, ten dollars.

Mr. LIGHTFOOT.—Admitted.

Mr. ROBERTSON.—Under date of July 8, 1867, receipt from W. T. Martin, rent of Kioloku, six months to June first, ten dollars.

Mr. LIGHTFOOT.—Admitted.

Mr. ROBERTSON.—Under date of January 21, 1868, receipt from W. T. Martin, rent of Kioloku six months to December 1—68, ten dollars. [159—91]

Mr. LIGHTFOOT.—Admitted.

Mr. ROBERTSON.—Under date of January 11, 1869, the receipt from W. T. Martin, rent of Kio-

loku, one year to December 1—68, twenty dollars.

Mr. LIGHTFOOT.—Admitted.

Mr. ROBERTSON.—That the final account of J. O. Dominis, administrator of the estate of Annie Keohokalole shows, *inter alia*, the receipt, under date of January 19th, 1869, from T. Martin ten dollars, and on March 19th—I can't make that date out—ten dollars—I will lump those two together, if you like. The accounts of J. O. Dominis, as administrator, show the receipt of two payments from T. Martin of ten dollars each, without specifying what it was for.

Mr. LIGHTFOOT.—That is admitted.

Mr. ROBERTSON.—Which I contend is inferentially for six months each.

I think that's all I have to show by this witness. Have you anything, Mr. Lightfoot, while the record is here?

Mr. LIGHTFOOT.—Yes. May I have the record, please?

We wish to show that on the proceedings for the appointment of an administrator of the estate of Caesar Kapaakea, deceased A. F. Judd testified that he knew the deceased and that he owned a small piece of land at Makiki, three or four acres, which was incumbered, and there was not enough money—not enough property to pay his debts. Is that admitted?

Mr. ROBERTSON.—I admit the fact but dispute its relevancy.

Mr. LIGHTFOOT.—As long as you admit the fact—I haven't disputed the relevancy of any of

these other matters. I don't know whether that comes within our—quite within our agreement—whether I haven't "bought a pig in a poke" I thought were going to rely upon *that* we found in the [160—92] record and let it go in. I might have disputed the relevancy of several little things that you read there.

Mr. ROBERTSON.—Well, we are not claiming under Kapaakea.

Mr. LIGHTFOOT.—May we have that admission in evidence, that "We are not claiming under Kapaakea," because that will further clear up the situation. I take it you are claiming solely under Annie Keohoklolo?

The COURT.—Then that would not be pertinent.

Mr. LIGHTFOOT.—Then it won't be pertinent. Well, it might be, your Honor, on the theory that Kapaakea died—had died seized of Kioloku and had devised to Annie, his wife.

The COURT.—But what about the admission?

Mr. LIGHTFOOT.—The admission is that they do not claim through Kapaakea.

The petition for—of J. O. Dominis for letters of administration on the estate of Annie Keohokalole, deceased, sets forth that the value of the property of which she died possessed is about three thousand dollars. Is that admitted?

Mr. ROBERTSON.—The statement is that "the estate of said deceased, so far as I have been able to ascertain the same, is of about the value of three thousand dollars." We admit that.

Mr. LIGHTFOOT.—That subsequently J. O.

Dominis was appointed administrator.

Mr. ROBERTSON.—That is already in.

Mr. LIGHTFOOT.—That is admitted. Under a bond of a thousand dollars—I don't know if that is material. That J. O. Dominis petitioned to sell the real estate and in his petition alleged that there were claims against the estate of about fifteen hundred dollars and there was not sufficient personal estate and it became necessary—it becomes necessary— [161—93] to sell the whole or some part of the real estate for the payment of debts.

Mr. ROBERTSON.—Yes, we admit that.

Mr. LIGHTFOOT.—That he was thereupon, after proper proceedings, licensed to sell the real estate.

Mr. ROBERTSON.—No, no—

Mr. LIGHTFOOT.—To sell certain real estate, enumerated.

Mr. ROBERTSON.—To sell two pieces of real estate.

Mr. LIGHTFOOT.—Two pieces of real estate, the Ahupuaa of Honohina and the Ahupuaa of Kauwela. Honohina in Hilo and the Ahupuaa of Kauwela in Kau.

Mr. ROBERTSON.—Yes, we admit that he was authorized to sell those two pieces.

Mr. LIGHTFOOT.—That the Ahupuaa of Honohina was sold to Stanley for six hundred dollars—

Mr. ROBERTSON.—We submit that is immaterial and irrelevant.

Mr. LIGHTFOOT.—It is not very material.

That Kauwela was sold to Wilcox for seven hundred and twenty-five.

Mr. ROBERTSON.—Same objection.

The COURT.—That is immaterial. Sustained. It is immaterial. No reference to the land in question?

Mr. LIGHTFOOT.—No reference to the land in question.

Mr. ROBERTSON.—Except that it was included in the partition—

The COURT.—Oh, yes, but I mean in this license to sell.

Mr. ROBERTSON.—No.

Mr. LIGHTFOOT.—That the sale was confirmed.

Mr. ROBERTSON.—We admit that.

The COURT.—How is that material anyway?

Mr. ROBERTSON.—I don't know how it is material, your Honor, but I don't like to object to everything counsel proposes. [162—94]

Mr. LIGHTFOOT.—That the accounts of Bishop—C. R. Bishop, trustee, extend from 1860 to 1868, and the only reference to Kioloku are—references to Kioloku in those accounts are the receipts from Martin referred to and admitted.

Mr. ROBERTSON.—We admit that. '61 to '68, your Honor.

Mr. LIGHTFOOT.—That there are in the records of the estate of Kapaakea and Keohokalole any vouchers showing moneys paid for the estate and there is no voucher showing the payment of taxes for the land of Kioloku.

Mr. ROBERTSON.—That is admitted. That

Mr. Bishop's accounts from '61 to '68 do not show the expenditure of any money for Kioloku.

Mr. LIGHTFOOT.—I think that's all we desire to have admitted.

Mr. ROBERTSON.—That's all, Mr. Parker.

We offer in evidence now, if your Honor please, a certified copy of the partition deed made between John O. Dominis and Lydia K. Dominis, his wife, of the first part, Likelike of the second part, David Kalakaua and Kapiolani, his wife, of the third part and W. P. Keahoolewa by his guardian, Keelikolani, of the fourth part; dated July 3, 1870, recorded in the Registry of Conveyances in Honolulu in Book 30, pages 364 to 367.

Mr. LIGHTFOOT.—We object to that on the ground that it doesn't appear that the heirs of Annie Keohokalole had any interest in the land in question.

The COURT.—It will be admitted in evidence. Objection's overruled.

(Read.) (Exhibit 12.)

Mr. ROBERTSON.—Now, Mr. Lightfoot, I would like to fix the dates at which the change of ownerships and possessions occurred. I would like to get that from here. That is that David Kalakaua [163—95] *Kalakaua* conveyed to Obadiah Spencer the land in question by deed dated December 15, 1873—I understand, your Honor, that counsel make these admissions as I go on—That Kalakaua and Kapiolani, his wife, conveyed to O. B. Spencer, by deed dated December 15, 1873, recorded in Book 38, page 438—

Mr. LIGHTFOOT.—I shall have to make a little objection, may it please the Court. The way it is put there, counsel says Kalakaua and wife conveys to Spencer. Now, there was a difference between the wife and Kalakaua—The husband conveyed—The facts are, as I understand them and as they are admitted, that Kalakaua conveyed the land to a third party, conveyed the land to his wife Kapio-lani by a mesne conveyance—

Mr. ROBERTSON.—They both executed this deed.

Mr. LIGHTFOOT.—I think it ought to appear in the record that Kalakaua had put title in this land in his wife.

The COURT.—At some time previous to this?

Mr. LIGHTFOOT.—At some time previous to this.

The COURT.—But they turned around and both signed a deed?

Mr. LIGHTFOOT.—Both signed a deed.

(Argument.)

I am willing to acknowledge that I don't see that it would have any particular bearing at this time but some question might arise.

(Argument.)

Well, if it becomes material hereafter in this hearing I will ask to make that correction.

The COURT.—Certainly, that will be granted.

Mr. ROBERTSON.—The next, that O. B. Spencer conveyed by deed to A. Hutchinson, dated May 12, 1874, recorded in Book 39, [164—96] page 323.

Next comes a deed from the executors of A. Hutchinson, deceased, by order of the probate court, conveying to Claus Spreckels and W. G. Irwin, trading together under the firm name of W. G. Irwin & Co., of Honolulu; dated February 28, 1881, recorded in Book 70, page 2.

Next comes a release of dower by Margaret A. Hutchinson, widow of A. Hutchinson, deceased, to Claus Spreckels of San Francisco of her dower right in the land in question. Dated April 30th, 1880, recorded in Book 65, page 78.

Then comes a deed—

The COURT.—I understand all these deeds specifically describe the land in question?

Mr. ROBERTSON.—Yes, your Honor, and in some cases other lands.

The COURT.—Yes.

Mr. ROBERTSON.—Next comes a deed executed by Claus Spreckels and W. G. Irwin, copartners under the firm name of W. G. Irwin & Co.—

The COURT.—Do their wives joint in that?

Mr. ROBERTSON.—No.

The COURT.—I think Mrs. Irwin is still alive.

Mr. ROBERTSON.—Partnership real estate. There was no dower. We are not worrying about those little things.

—John A. Buck of Hawaii, and John D. Spreckels, A. B. Spreckels and C. A. Spreckels, of San Francisco, partners under the firm name of J. D. Spreckels & Bros., purporting to convey the land in question to the Hutchinson Palantation Co., a Hawaiian corporation. Dated November 28th,

1884, recorded in the Registry of Conveyances in Honolulu, book 93, page 16.

The COURT.—I thought that earlier in the proceedings the Hutchinson Sugar Plantation Co. was described as San Francisco, California? [165—97]

Mr. ROBERTSON.—Yes, your Honor, we are gradually getting to that.

The next was a deed from the Hutchinson Sugar Plantation Co., a Hawaiian corporation, covering the land in question, to Louis Sloss of San Francisco, dated June 1, 1890, recorded in the Registry of Conveyances of Honolulu in Book 119, page 120.

And finally a deed from Louis Sloss of San Francisco to the Hutchinson Sugar Plantation Co., a California corporation, covering the land in question. Dated June 11, 1889. Recorded in the Registry of Conveyances, Honolulu, in Book 118, page 376.

The COURT.—Is this the same corporation?

Mr. ROBERTSON.—No, your Honor, Hutchinson Plantation Co., was a Hawaiian corporation; Hutchinson Sugar Plantation Co. is a California corporation.

Mr. LIGHTFOOT.—May it please the court, we are willing to admit those facts as alleged, stated by counsel, and at this time, to save time, we ask counsel to admit, on his part, that in none of these instruments, from the partition deed down, which have been mentioned, is there any description or any deràignment of title showing the land commission award or a royal patent or royal patent grant or any reference to the Mahele.

Mr. ROBERTSON.—That is, the land is simply mentioned by name.

Mr. LIGHTFOOT.—The land is simply mentioned by name, with no derivative title.

Mr. ROBERTSON.—We admit that. Probably you will also concede, Mr. Lightfoot, that as far as these deeds cover other lands the same is true; they do not purport to state their [166—98] derivation?

Mr. LIGHTFOOT.—I couldn't say that as I have not examined them with that end in view.

The COURT.—Well, isn't it immaterial whether it states the source of title or not?

(Argument.)

Mr. ROBERTSON.—The proposition was nowhere in these instruments that have just been referred to.

If you will admit that the Hutchinson Sugar Plantation, a California corporation, is authorized to do business in this Territory—?

Mr. LIGHTFOOT.—We will so admit, your Honor.

Mr. ROBERTSON.—Well, I think we rest, then.

Mr. LIGHTFOOT.—Call Mr. Wall.

Testimony of Walter E. Wall, for Petitioner (In Rebuttal).

WALTER E. WALL, a witness called on behalf of petitioner in rebuttal, being first duly sworn, testified as follows:

Direct examination by Mr. LIGHTFOOT.

Q. Your name is Walter A. Wall, and you are

(Testimony of Walter E. Wall.)

surveyor, Territorial Surveyor of the Territory of Hawaii? A. Walter E. Wall.

Q. Walter E. Wall, yes. Mr. Wall, how long have you held the office of Territorial Surveyor?

A. Since February 1st, 1901, with the exception of a period of two years, during which time I was assistant surveyor in charge of the office.

Q. Who was your immediate predecessor in office?

A. Professor W. D. Alexander. [167—99]

Q. At that time he was called Surveyor General, wasn't he? A. Surveyor General.

Q. When was the title of the office changed, by the Organic Act?

A. I would say that it was Surveyor General just prior to that. The title of the office was changed under the Organic Act from that of Surveyor General to Surveyor of the Territory.

Q. When did you first become connected with the Survey Office?

A. I think it was in the year 1890; 1890 or '91; 1890, I think.

Q. In what capacity? A. As a sub-assistant.

Q. And you have constantly been connected with the office since then?

A. With the office of the surveyor, yes, sir.

Q. I will ask you— You are in charge of all the maps and records of the Survey Office? A. Yes.

Q. Showing you the map with the pencil marking on it— Where is that, Mr. Wall? Referring to map of Kau, Hawaii, by F. S. Lyman, registered

(Testimony of Walter E. Wall.)

575, I will ask you to look at that map— (Referring to Exhibit No. 10.)—Have you examined— Does that map show the Ahupuaa of Kioloku?

A. Yes.

Q. Have you examined that portion of the map?

A. Yes.

Q. Is there on that map a pencil memorandum?

A. Yes.

Q. What does it say?

A. 834 acres, no title. [168—100]

Q. Do you know in whose handwriting that was made? A. Yes.

Q. Whose handwriting was it?

A. Professor W. D. Alexander's.

Q. Have you anything to—or do you know when that pencil memorandum was made on that map?

A. No.

Q. Can you tell whether or not it was made before you became the head of the office?

A. Yes, it must necessarily have been made before.

Q. It was made before that time. Have you any— Do you remember seeing that map at any time when that pencil mark wasn't there?

A. I have seen the map.

Q. Before the pencil mark was—

A. Before I was made surveyor of the Territory.

Q. No, but I say you have never seen the map at any time before the pencil mark was put on there?

A. No, I don't recollect having seen it before.

(Testimony of Walter E. Wall.)

Q. Can you account for the presence on that map of that pencil mark; how did it come to be there?

Mr. ROBERTSON.—I object to that as being a mere conclusion of the witness, irrelevant and immaterial.

The COURT.—At best, it would be merely an opinion, wouldn't it?

Mr. LIGHTFOOT.—I think that, as head of the survey department, his opinion would be receivable in evidence, would it not, in matters of public—

(Argument.)

I will withdraw the question.

Q. Mr. Wall, what is the custom of the survey department of [169—101] the Territory of Hawaii with regard to making annotations on maps; are such annotations made or not?

Mr. ROBERTSON.—I object to that as irrelevant and immaterial, what the custom is. It is certainly a sorry day for this Territory if it is the custom there to monkey with recorded maps.

(Argument.)

The COURT.—I think you either ought to withdraw your other question or—

Mr. LIGHTFOOT.—I did withdraw it.

Mr. ROBERTSON.—I object to this as absolutely irrelevant and immaterial what the custom is there.

(Argument.)

Mr. LIGHTFOOT.—I wish to show by this witness that proper changes are made in these registered maps from time to time, and they always have been made. Or, in other words, the registered maps

(Testimony of Walter E. Wall.)

are not things that are fixed and certain, like a deed or instrument that is recorded in the registry office, Oahu, but it is a thing of a progressive nature; that is, they are for the use of the public and kept up to date for public use.

(Argument.)

The COURT.—I think the objection is well taken. I will sustain the objection, because these records ought to be—we ought to be able to look to them as having value, and if they are subject to change by any person that sees fit to change them, no matter who the person may be or how much he may be convinced of the fact that the change would be a good thing, I think it is wrong. When the map is put in there we must assume the things existed in that condition at that time. I don't think the pencil marks ought to be [170—102] allowed. Objection sustained.

Mr. LIGHTFOOT.—Q. I call to your attention, Mr. Wall, registered Map No. 1409. Will you look at that map and find the Ahupuaa of Kioloku?

(Witness indicates.)

Q. Can you tell, Mr. Wall, from this map how that land is classified?

Mr. ROBERTSON.—One minute—

Mr. LIGHTFOOT.—Q. That is to say, is it classified in this map as Government land, crown land or konohiki land?

A. It is classified as Government land.

Q. What is the date of this map—Oh, 1885; that's correct, is it?

(Testimony of Walter E. Wall.)

A. September, 1885. That's correct.

Q. How do you tell that that is classified as Government land?

A. Government land shown in green.

Q. On this map?

A. Yes, in green. It is the practice to show them in green, and they are also numbered and referred to in other records, in which they are described as Government land.

Q. Showing you registered map numbered—

A. Kau, District, Hawaii.

Mr. LIGHTFOOT.—May I have that offered in evidence in the same way?

The WITNESS.—Two thousand feet to one inch. Compiled by J. F. Brown, September, 1885, principally from surveys by F. S. Lyman.

Mr. LIGHTFOOT.—May I have that—I offer that in evidence.

Mr. ROBERTSON.—We object to that, if the court please, on the ground that it simply shows the opinion of the man who compiled the map as to whether the land was Government or private, and that we have no opportunity of cross-examination on. [171-103]

The COURT.—I didn't catch that, the land. Does it cover the land in question?

Mr. LIGHTFOOT.—The land of Kioloku is shown there in green, this Government land. We ask that this be offered in evidence.

Mr. ROBERTSON.—It doesn't appear that this

(Testimony of Walter E. Wall.)

witness had anything to do with the making of that map.

The COURT.—Well, but it comes from an official source and made by Mr. Lyman, who was the surveyor at that time?

The WITNESS.—J. F. Brown, who was special assistant on that particular work.

The COURT.—It seems to me that has some pertinency.

Mr. ROBERTSON.—Exception.

The WITNESS.—It was his special duty.

(Petitioner's Exhibit —.)

Mr. LIGHTFOOT.—Q. I show you, Mr. Wall, registered map No. —.

A. Registered number 1455, pigeon hole 1452.

Mr. ROBERTSON.—What's that?

A. Registry number 1455.

Mr. LIGHTFOOT.—Q. 1455. That is a registered map? A. Registered map.

Q. Will you see if you can find the Ahupuaa of Kioloku on that map?

A. Yes.

Q. What color is the ahupuaa in that map,—sort of reddish brown? A. Reddish brown.

Q. Will you refer to the legend on the map to see how Kioloku is classified in that map?

A. Unassigned land.

Q. Classified as unassigned lands. I offer the map in evidence. [171A-104]

Mr. ROBERTSON.—We object to that. We object to the receipt of the map in evidence on the

(Testimony of Walter E. Wall.)

ground it is irrelevant and immaterial. It simply expresses the opinion of the compiler of the map and we have no opportunity to cross-examine him; it not appearing that this witness had anything to do with the making of the map.

The COURT.—As I understand, this is an official map, comes from the survey office. It will be admitted in evidence.

(Petitioner's Exhibit —.)

The WITNESS.—The title of it "Map of a portion of Kau, Hawaii, from Kealakaa to Punaluu. Map and survey by M. D. Monsarrat, 1887. Scale 1,000 feet equals one inch."

Mr. ROBERTSON.—In other words, it doesn't purport to be a map of Kioloku, according to that statement. It doesn't purport to be a map of Kioloku?

A. It is a map of the district, showing the titles in that section, in the Kau District, between certain lands.

Q. 1887?

A. Dated 1887.

Mr. LIGHTFOOT.—I understand that is admitted?

The COURT.—Yes.

Mr. LIGHTFOOT.—Q. I show you, Mr. Wall, Government registered map number 1807 and ask you to see if you can find the Ahupuaa of Kioloku on that map. A. Yes, sir.

Q. What color is it designated?

A. In green.

(Testimony of Walter E. Wall.)

Q. What does the color green on that map signify?

A. Government land.

Q. That Kioloku is Government land? [172-105]

A. Kioloku is recognized—Kioloku is represented as Government land.

Q. Anything on the map that indicates that green is—Where is the original?

A. Map of Kau, Hawaii, from Punaluu to Kaalae. Surveyed by M. D. Monsarrat, J. S. Emerson and F. S. Lyman. Scale one to twenty-four thousand. Map by F. S. Dodge, 1894.

Mr. ROBERTSON.—Q. There is no key to the different colorings given, is there?

A. A key to the colors?

Q. Yes.

A. That is a standard color used by the office for all of its maps of that date, the green representing Government land.

Q. Well, the map that was last referred to didn't have Kioloku colored in green, did it.

A. That was the map of the private surveyor, Mr. Monsarrat, not prepared by the Government office.

Mr. LIGHTFOOT.—Q. I understand that all Government maps are colored green for Government lands?

A. The Government lands are designated in green.

Mr. LIGHTFOOT.—I offer this in evidence.

Mr. ROBERTSON.—I object to that, if the court please, on the ground it is irrelevant and immaterial; does not purport to be the work even of the man who made it there. The map was made by F. S. Dodge

and it shows on its face that it is simply compiled by him from surveys made by other persons, including Mr. Lyman who made the map of 1879, and shows Kioloku as private land.

(Argument.)

The COURT.—It comes from the survey office. We must depend [173–106] on maps that appear to be regularly made.

Mr. ROBERTSON.—Doesn't your Honor see the point? Here's a map compiled, not made from surveys but compiled by F. S. Dodge from certain other maps, including the map of F. S. Lyman of 1879. Lyman's map shows that Kioloku was private land, and yet F. S. Dodge, who purports to make another map sometime in the eighties, compiles from that very map of Lyman's and represents Kioloku as being Government land. How can that stand?

The COURT.—I think that would perhaps go to the weight of it but I think it is admissible. I will admit it in evidence. I think it is admissible. Now it is four o'clock.

(Further hearing continued until nine o'clock tomorrow morning). [174–107]

Territory of Hawaii Land Court.

PETITION No. 283.

In the Matter of the Petition of THE TERRITORY OF HAWAII to Register and Confirm Its Title to the AHUPUAA OF KIOLOKU, in the District of Kau, Island and County of Hawaii, Territory of Hawaii.

Oct. 26, 1918.

Mr. LIGHTFOOT.—Let it appear of record that this is by request of both parties and that we have no claim that this is *dies non juris*.

Mr. ROBERTSON.—Yes.

The COURT.—Both parties request the court to sit today and hear this matter?

Mr. ROBERTSON.—Yes, your Honor.

The COURT.—Let the record show that.

WALTER E. WALL, being recalled for further examination testified as follows:

Mr. LIGHTFOOT.—Q. Mr. Wall, you yesterday, prior to adjournment, had testified as to the custom of the survey department that, in all maps by the department, Government land is colored green. Is there any rule as to the coloring of Crown lands?

A. Crown lands were designated in yellow. [175–108]

Q. In yellow, and that is a custom that has been followed how long?

A. Ever since I entered the office in 1890 and, I think, prior to that.

Q. Prior to that. Mr. Wall, referring to the term “konohiki”; there is a kuleana within the Ahupuaa of Kioloku, Land Commission Award 9659 to Keka-huna, survey made 1852, in which the boundaries on the four sides of the kuleana are given as “Konohiki.” What have you to say with regard to the value to be placed upon the use of the term “Konohiki” in such cases?

Mr. ROBERTSON.—We object to the question

(Testimony of Walter E. Wall.)

on the ground no foundation has been laid for it, as to the competency of the witness—

The COURT.—That seems to be correct.

Mr. LIGHTFOOT.—I will withdraw the question.

Q. You say you became connected with the survey department in what year?

A. I entered the survey department in 1890.

Q. 1890. A. Yes, 1889 or 1890.

Q. Eighteen years ago—Twenty-eight years?

A. Twenty-eight years.

Q. Twenty-eight years, and during that time state whether or not you have examined very many surveys of lands in the Hawaiian Islands?

A. I have.

Q. State whether or not, during that 28 years' experience, you have studied the descriptions of boundaries in such grants and awards? [176-109]

A. Yes.

Q. Constantly?

A. Part of the regular work, yes.

Q. Part of the regular work of the department.

A. Yes.

Q. Now will you state what value is to be placed on the use of the word "Konohiki" as a boundary as to a survey made in 1852?

A. The term "Konohiki" might be applied in perhaps more than one way. In general, from a knowledge, a general knowledge of the use to which it has been put, I would be disposed to think that it was a convenient term used by surveyors, who were indifferent to an extent as to the actual ownership but

(Testimony of Walter E. Wall.)

realizing that it belonged to other parties—

The COURT.—Q. Other parties?

A. To other parties, and not knowing the owner in reality, they would refer to it as “Konohiki.” For instance, the konohiki of a land is the agent, the head of the ahupuaa, the agent in charge of the land. And a surveyor—it is enough for him to know that it was along somebody else’s land and in kuleanas, in particular, that was a very common reference, is found describing kuleanas and the various classes of land, Crown land, lands of the chiefs and the lands of the Government.

Q. Land of the Government, you refer to?

A. I say it is very commonly used. It was a convenient term to apply as of belonging to someone other than the owner of the land being described.

Q. I didn’t quite understand you. You mean he would use the term konohiki if the surrounding land belongs to the Government [177–110] the same as he would if it belonged to a private individual?

A. It is frequently used. It was used, for instance—Now let me see, if the term konohiki was used in a survey prior to the date of the division or Mahele, that might properly apply to a konohiki land or to the konohiki, the agent in charge of it.

Q. That would be prior to 1852, though, wouldn’t it?

A. Now then, if a surveyor—

Q. Referring to the time prior to 1852, you say?

A. Prior to 1848.

Q. Yes.

A. Prior to 1848. Now, if a surveyor refers sub-

(Testimony of Walter E. Wall.)

sequently to that it depends on his knowledge as to the ownership. If he was a painstaking man who had full knowledge of the ownership, did it knowingly, why the konohiki would refer to the occupier or possessor of the land at the time.

Q. And would it mean private ownership?

A. Well, it might be a Crown land or it might be one of the konohiki lands. By konohiki land I would mean a land that was in the possession of a high chief and continued in his possession, perhaps, until title was acquired.

Mr. LIGHTFOOT.—Q. Have you in mind any specific occasion in which the term “Konohiki” was used in a survey as a boundary when it was a boundary between the land surveyed and either Government land or Crown land?

Mr. ROBERTSON.—If the court please, we object to the question on the ground that it is irrelevant and immaterial unless it be limited to the land in dispute.

·(Argument.)

The COURT.—You haven’t yet asked him even the general [178–111] question as to what the custom is. I think it would be well to ask him and then, possibly, as to this other phase of the matter which, of course, I have not ruled upon now.

Mr. LIGHTFOOT.—Put it in that way. Mr. Wall—

The COURT.—Withdrawing the other question?

Mr. LIGHTFOOT.—Withdrawing the other question.

(Testimony of Walter E. Wall.)

Q. Prior to the Mahele, say, what was the custom in describing boundaries between private lands and—Well, that question is stupid, of course—

The COURT.—Weren't any private lands.

Mr. LIGHTFOOT.—I shall have to withdraw that question.

The COURT.—Yes.

Mr. LIGHTFOOT.—We will get there by and by.

Q. Prior to the Mahele what was the custom of surveyors in describing the boundaries of lands as to the use of the words "Konohiki," "Aupuni" or "Lei Alii"? I suppose the question might arise were there any kuleanas prior to the Mahele.

Mr. ROBERTSON.—I submit the question is unintelligible. It was the Mahele that created the distinction and made the classification.

(Argument.)

Mr. LIGHTFOOT.—Q. Were there surveys of lands prior to the Mahele?

A. Yes.

Q. That you know of? A. Yes.

The COURT.—Q. And maps made of those surveys prior to the Mahele?

A. There were surveys and sketch plans; not comprehensive; [179-112] district maps showing lands.

Q. Just a sketch of the individual piece of land.

Mr. ROBERTSON.—Simply town lots, weren't they?

A. Yes. Anybody speaking of "surveys," kono-hiki surveys as a general rule—

(Testimony of Walter E. Wall.)

Mr. LIGHTFOOT.—Q. And what was the custom as to the boundaries of those lands in those ancient surveys?

A. Well, my understanding of the matter is that, prior to the Mahele, the larger ahupuaas were very strictly konohiki lands. They were held by the higher chiefs, under the king, who really owned or controlled all the lands. The chiefs under him were the agents on the konohiki property, and under them descriptions—those smaller lands refer to them as abutting along konohiki. That's the way the term came to be applied.

The COURT.—There is no evidence of anyone as yet that shows the date of the survey of the land in question, Kioloku, the boundaries of that?

Mr. ROBERTSON.—1874. It is in evidence.

Mr. LIGHTFOOT.—Shortly after Kalakakaua had come to the throne.

The COURT.—Yes. Well, it had an existence by name prior to that?

Mr. LIGHTFOOT.—Oh, it had.

Q. Had it not been surveyed prior to that?

A. I think not.

Q. There is no evidence—

A. I don't know any evidence of any survey.

Q.—prior to the Kalakaua survey in 1874, is there, of Kioloku, any that you know of, referring to the whole ahupuaa?

A. I don't recall any, sir. [180-113]

Mr. LIGHTFOOT.—This is just for the purpose of getting the ruling of the court now; I don't wish

(Testimony of Walter E. Wall.)

to trench upon the former ruling of the court—

Q. I will ask you if you know of any particular instances in old surveys where the word *konohiki* was used as a boundary between the land surveyed and government or crown lands?

Mr. ROBERTSON.—We submit the question is objectionable under the ruling already made.

The COURT.—I think so. Objection sustained.

A. Yes.

The COURT.—No, the objection is sustained.

Mr. ROBERTSON.—Answer stricken out, your Honor?

The COURT.—He has answered, however. You move to strike it out?

Mr. ROBERTSON.—Yes, your Honor.

The COURT.—The answer will be stricken out.

Mr. LIGHTFOOT.—Q. I wish to understand the custom of the survey department of the Territory of Hawaii since you have become acquainted with it, relative to making annotations on maps. First, what is a registered map?

Mr. ROBERTSON.—I thought we had gone into that yesterday, your Honor. I object to the question on the ground that it is irrelevant and immaterial what the custom of the survey office has been.

The COURT.—What is a registered map, that's the question, I understand, the other portion having been withdrawn by reason of putting that one.

Mr. ROBERTSON.—All right.

The COURT.—That's correct, is it?

Mr. LIGHTFOOT.—Yes, your Honor. [181-114]

(Testimony of Walter E. Wall.)

A. A registered map of the survey department is one that has been placed on file for reference and given a regular number; indexed and given a number for reference.

The COURT.—Q. Becomes part of the record of the office?

A. It is different from the records—

Q. It becomes a part of the official record in the office? A. Yes.

Mr. LIGHTFOOT.—Q. And registered maps are made and become part of the records of the office from time to time; they are not merely ancient documents, then? A. Well, not—

Mr. ROBERTSON.—I object to that, if the court please.

Mr. LIGHTFOOT.—It may be leading.

Mr. ROBERTSON.—We don't care about this witness' opinion as to what constitutes an ancient document.

The COURT.—Hasn't he answered the question when he says they become part of the records of the office when they are registered?

(Argument.)

Mr. ROBERTSON.—Whether new maps are now being filed and registered?

The COURT.—Yes, that is the way I understand it

The WITNESS.—Yes, maps are being filed from time to time.

The COURT.—Covering the same land—

A. Very same purpose, as they are accumulated, are acquired from private sources as well as those

(Testimony of Walter E. Wall.)

from surveys of the Government staff. They are filed for reference for further information in dealing with land titles and in arriving at more particularly the Government areas, to determine the limits of the Government land. [182—115]

Q. Well, isn't it a fact that some of these maps are occasioned—that is, the reason for making them is because there has been a change in the survey?

A. No, merely—May be an entirely new survey, an entirely new study, and it is filed there for what it is worth, to have given further consideration and reference, practically.

Q. For instance, a large tract of land may be cut up into smaller pieces and a new map may be made of it?

A. A new map may be made of it. A detail map generally is of a subdivision, of larger scale than for the purpose of giving a comprehensive idea of its position and extent, and reduction is made and the same is then embodied on the district map.

Mr. LIGHTFOOT.—Q. Now is any effort made to keep the—I withdraw that. So that all maps which are acknowledged by the Government to be correct and are recorded in the office of the surveyor of the Territory may be described as registered maps, is that true?

A. Well, the maps are regularly filed and registered, whether they are acknowledged to be correct or not. A map—don't necessarily need to acknowledge them to be correct. We are very glad to get all the information we can, as it assists in arriving at facts. We don't accept a plan when it is filed as rep-

(Testimony of Walter E. Wall.)

resenting the real facts,—None of us are absolutely accurate, so to speak, we are all likely to err some time or other; and maps are filed for their worth.

Q. Now then, when any change takes place with regard to the land which is described on a registered map, for instance, a land grant, or, for instance, the changing of a road, or, for instance the subdivision of a piece is anything made on [183—116] a registered map of such change?

Mr. ROBERTSON.—We object to that, on the ground that it is irrelevant and immaterial. Simply filling up the record here with matters that do not throw any light on the issues in this case whatever.

Mr. LIGHTFOOT.—This arises, of course, on account of the pencil memorandum made on the registered map by Professor Alexander, on the map of Mr. Lyman which is a compilation. It seems to me that, in view of the position taken by counsel as to that pencil memorandum, that we should be able to show what is the custom and what has been the custom of the survey department with regard to making of such indications of changes as I have referred to for the purpose of keeping maps up to date.

(Argument.)

The COURT.—I think the objection is well taken. It will be sustained.

Mr. LIGHTFOOT.—Q. Do you in the survey office record and register any maps relating purely to contracts between private parties?

Mr. ROBERTSON.—Objected to as irrelevant and

(Testimony of Walter E. Wall.)

immaterial, having no bearing on any issue in this case.

The COURT.—I fail to see the materiality.

(Argument.)

I think the objection is well taken. Objection sustained, on the theory that no question of that character, as I understand, is involved in this case.

Mr. LIGHTFOOT.—That's all, Mr. Wall.

[184—117]

Cross-examination by Mr. ROBERTSON.

Q. Have you here the maps that you had yesterday afternoon, Mr. Wall? A. Yes.

Q. Where is registered map 1407? A. 1409.

Q. 1409, yes. Referring you to Petitioner's Exhibit A, a map of the Kau District, dated in 1885; on it is designated that it is compiled by J. F. Brown, September, 1885, principally from surveys by F. S. Lyman? A. Yes.

Q. When a map is designated as having been compiled, that shows, does it not, that it is not the individual work of the man who made the map, but that he simply drew the map from surveys made by other people?

A. A compiled map by a private surveyor might represent his own work, individual work. That of one in a public office like the survey department might represent his own study, after consultation with others in the office and giving weight to matters that had been discussed and found to be correct by further investigation. The main object of a

(Testimony of Walter E. Wall.)

later compilation being to—to correct erroneous information.

Q. Yes, or it may be an erroneous correction as far as that goes? A. Possibly, yes.

Q. Let me ask you whether J. F. Brown was a private surveyor or in the Government employ when he made this map or when he compiled this map, rather? A. What's the date?

Q. September, 1885.

A. I would not be quite certain of it. We have records [185—118] that will show it. I rather think that he was in the Government survey at the time.

Q. Can you decide that right now, or not?

A. I couldn't make a positive statement.

Q. All right. Well, I will ask you again, if, when a map is stated on its face to be a compiled map, doesn't that necessarily imply that it is not the individual work of the compiler on the ground?

A. No, it is a compilation of records available. Mostly they are in the office.

Q. In other words, it negatives the idea of any original work being done by the man who compiled the map?

A. So far as the field work goes, yes, but not work in shifting out datas of documents and maps and records or maps available.

Q. So that, in compiling a map, although it is stated on its face to have been compiled principally from certain recorded surveys, might involve the changing of boundaries of land, for instance, by the

(Testimony of Walter E. Wall.)

compiler if, in his opinion, the original survey which he refers to as being among the data that he made the compilation from was not correct?

A. Yes, if the compiler had reasons to believe that the original from which he was compiling was not well established, had later and better authority, he would be disposed to add that where he could.

Q. Yes, In other words, Mr. Wall, generally speaking, isn't this the fact, that a map of a district showing the various lands and their boundaries, etc., really represents the understanding or opinion of the surveyor who made that map up at the time?

A. It does, in a sense, and yet it also represents the work of others. It refers to— On this particular map, for [186—119] instance, it refers to the surveys of Lyman principally. but it also implies that he had other surveys as well, and naturally consideration was given to the accuracy of the different records used in the compilation.

Q. Yes, but that doesn't come to the point. After all is said and done, referring particularly to this Exhibit "A" here, this map compiled by J. F. Brown, as a matter of fact it is correct to say that that map there represents the opinion or the understanding of Mr. Brown as to the character and situation of the lands shown on the map at the time he made it.

Mr. LIGHTFOOT.—I submit the question has been asked and answered, gone into completely.

The COURT.—I think the question is proper.

(Testimony of Walter E. Wall.)

A. Yes, naturally it is Mr. Brown's work or represents his opinion of it, possibly with the assistance of consultation in the office. Naturally, Mr. Brown approves of that record as it is there or he wouldn't have finished the map, but it is not necessarily his own views; he may have consulted others in the office there; he has made use of the office—office records, had opinions expressed back and forth where there were any differences of opinion. In other words, his conclusions; the conclusions there represent, yes, Mr. Brown's work, you might say.

MR. ROBERTSON.—Q. Well, doesn't represent his work so much as it represents his understanding? A. His understanding of it, yes.

Q. Well, do you mean that a surveyor, in compiling a map like this, would yield to the opinions of others with whom he may have consulted and by his map shown something that he himself did not fully agree to, but had yielded to the opinions of those [187—120] others? A. I should—

MR. LIGHTFOOT.—That is calling for an opinion of the witness.

THE COURT.—Do you object?

MR. LIGHTFOOT.—We object to it.

THE COURT.—I believe the objection is well taken.

THE WITNESS.—I think that is a fair question. He asked as to whether that surveyor would designate on the map there an opinion contrary to his own will—

(Testimony of Walter E. Wall.)

The COURT.—I think the objection should be sustained.

Mr. ROBERTSON.—Q. Now, one more, Mr. Wall, Registered Map 1907.

A. Map of Kau. Registered map 1807.

Mr. ROBERTSON.—I think, if the Court please, that these maps ought to be properly marked as exhibits in the case and left here.

The COURT.—It has always been the custom not to mark public records but to fully describe them in the minutes.

Mr. ROBERTSON.—What position does that put us in?

(Argument.)

Q. A blue-print could be made of these, I suppose, Mr. Wall?

A. My position in that matter is this,—I wish to make it very plain so there will be no possible misunderstanding in the matter,—I have frequently been asked to furnish certified copies of either a map as a whole or a portion of it. My practice in the past has always been to compare it very carefully and see that everything shown on that section of the map was designated on the tracing before I certified to it. I take it that it is not for me to say whether there is anything rightfully on there or otherwise. Now, take the map involved, there are notations there in pencil and I have [188—121] no knowledge as to whether they were placed on there before the instrument was registered, filed in the office, or not. If, for the sake of argument,

(Testimony of Walter E. Wall.)

we will say that they were not on there before they were filed, then, under the contention of opposing counsel we have absolutely no right to remove them.

Q. The question now is as to getting a certified copy of the map. Can you not make blue-prints of it?

A. Tracings can be made and blue-prints furnished. I did have a tracing prepared and was writing a certificate on it when I was called to withhold it for the reason that they wished to have those pencil notations eliminated.

Mr. ROBERTSON.—It seems to me that we ought to have certified copies of all the maps put in evidence.

The WITNESS.—They can be made. We are very willing to make them,—anything that either counsel asks for and the Court orders, we will make and certify.

(Argument.)

Mr. LIGHTFOOT.—Well, we will supply certified copies of the maps we have used.

Mr. ROBERTSON.—Then, as far as our exhibit is concerned, I insist, if the Court please, that your Honor retain the map on the file of the case here,—the map of 1879. It is our exhibit, not theirs, and we are entitled to have it remain in the record here. That is what I am driving at.

(Argument.)

I deny absolutely that that map of 1879 of F. S. Lyman's, of the Kau District, is being used from

(Testimony of Walter E. Wall.)

day to day, by the public or anybody else.

The COURT.—Q. Is it in constant use? [189—122]

A. It has been customary in the past to furnish certified copies.

Q. Well, I mean as far as the use of that map in the office is concerned.

A. Well, it may be consulted at any time and may not be consulted in months, and yet some one may be in the very next hour or next day to see it. It is a convenient and proper thing, I believe, to have the record in the survey office. They are available at the call of the Court at any time, at five minutes' call, or a certified copy of the map as a whole or a portion may be had.

(Argument.)

The COURT.—Well, I will ask the surveyor in his certificate to note the fact that certain marks were annotations in pencil; I would ask that.

The WITNESS.—Oh, that could very easily be done. That we are perfectly willing to do.

The COURT.—In addition to the certificate that you make of the certified copy, all pencil notations, whatever they may be, have that a part of the certificate, point them out, say that such and such pencil memorandum—or such a mark is in pencil.

The WITNESS.—Well, I have already started out to do that and that is what they objected to doing; I am willing to do that.

(Argument.)

The COURT.—I think that will be sufficiently

(Testimony of Walter E. Wall.)

clear. That is the best we can do under the circumstances

Mr. ROBERTSON.—Q. Well, referring now to Exhibit “C” in this case, the map—Map No. 1807. This is a map compiled by F. S. Dodge from surveys made by M. D. Monsarrat, J. S. Emerson and F. S. Lyman, was it? [190—123] A. Yes.

Q. And what you have already said with reference to the other map, Exhibit “A,” and compiled maps in general, would apply to this map, would it not? A. Yes.

Q. This map, dated in 1879, by F. S. Lyman, said to be compiled by him, shows on its face—no, contains on its face—this statement, “Showing ahupuaas, grants and unsold government land,” does it not? A. Yes.

Mr. LIGHTFOOT.—Compiled by F. S. Lyman in 1879.

Mr. ROBERTSON.—Yes, exactly.

The CLERK.—That is exhibit No. 1 of respondent.

Mr. ROBERTSON.—Q. You yourself had nothing to do with the making of any of these maps?

A. Nothing to do with the making of the maps.

Q. You don’t claim to be versed in the Hawaiian language, do you, Mr. Wall?

A. Not an expert in the Hawaiian language.

The COURT.—Q. Read it or write it, do you?

A. No.

Mr. ROBERTSON.—Q. I will call your attention to the plan in evidence here. Respondent’s

(Testimony of Walter E. Wall.)

Exhibit No. 9. It shows the Ahupuaa of Honuapo, adjoining the Ahupuaa of Kioloku. It shows that the Ahupuaa of Honuapo was awarded to W. C. Lunalilo by Land Commission Award 8559B, Apana 13. Would it be correct to say that, from and after the date of that award, W. C. Lunalilo was the konohiki of that ahupuaa?

A. What was the date of the award? I would like to know the date of the award. [191—124]

Q. I don't know. Doesn't make a bit of difference, as a matter of fact. Wasn't the awardee of any ahupuaa from and after the date of his award the konohiki of that ahupuaa?

A. The owners of the awards, the chiefs, yes, were konohikis.

Q. Well, I will ask you the question, then, that we came away from. Irrespective of the date of Land Commission Award 8559B, as a matter of fact, from and after the date of that award, whatever it was, wasn't W. C. Lunalilo the konohiki of the Ahupuaa of Honuapo?

A. Yes, he probably was the konohiki.

Q. What's that?

A. Yes, he was the konohiki.

Q. What are the four large general classes of lands in these islands? A. What's the question?

(Question read by the reporter.)

A. There were the crown lands, the konohiki land, Government land and the kuleanas.

Q. Yes, the crown lands and Government lands being public property, the konohiki lands and the

(Testimony of Walter E. Wall.)

kuleanas being private property, isn't that so?

A. The crown lands were held by the crown at the time as of their own lands, the title really being in the Government; they have come down to the Government at the present time; so the crown and Government land would be Government; konohiki lands would be the private ownings of the chiefs, and the kuleanas the subjects of the king or chief.

Q. That is, the kuleanas the private property of the common people?

A. Of the common people holding under the chiefs.

Mr. ROBERTSON.—That's all. [192—125]

**Testimony of Robert C. Lydecker, for Petitioner
(In Rebuttal).**

ROBERT C. LYDECKER, a witness called on behalf of the petitioner in rebuttal, being first duly sworn, testified as follows:

Direct Examination by Mr. LIGHTFOOT.

Q. Your name, please, sir? A. What's that?

Q. What is your name?

A. Robert C. Lydecker.

Q. And what is your position?

A. Librarian, Public Archives.

Q. And, as such, you have custody of the archives of the Government?

A. Why, I am in charge of them. The custody is really in the Commission.

Q. But you have charge of them?

A. I have charge of them.

(Testimony of Robert C. Lydecker.)

Q. Showing you your certified copy of Exhibit 1 I will ask you from what records that was taken.

A. Well, it was taken from the original letter on file in Archives.

Q. It was taken from the original letter on file in what case?

A. In the—original—well, I can't say in what case; I have no knowledge of that.

Q. Were there other papers with that?

A. There were four enclosures with this.

Q. Four enclosures with that? A. Yes, sir.

Q. And they were filed in the case of Thurston, Minister of the Interior, against Bishop, were they not?

A. No, I don't know that—that this letter was filed in that [193—126] case.

Q. But it was with those papers, was it?

A. No, sir, it was with—it was not—

Mr. ROBERTSON.—I object to it as irrelevant and immaterial, whether the letter in question has ever been used as an exhibit in some other lawsuit.

Mr. LIGHTFOOT.—I want to get the rest of the papers in the same bunch that this came from.

Q. Have you the papers now in the custody of the archives, public archives, in the matter of Thurston against Bishop? A. Yes, sir.

Mr. ROBERTSON.—Objected to as irrelevant and immaterial, having no bearing on this case.

The COURT.—Of course I don't know what the papers are yet. I can't rule upon the objection; I don't know what the papers are yet.

(Testimony of Robert C. Lydecker.)

The WITNESS.—I will qualify that statement by saying all the papers that were found in the archives was in one bundle, tied together such as I have them here; whether they were all the papers or not of course I can't tell.

The COURT.—Perhaps you might state in a general way what these were.

Mr. LIGHTFOOT.—One of the papers, marked as an exhibit in that case of Thurston versus Bishop.

The COURT.—Exhibit for what purpose? What is it?

Mr. ROBERTSON.—I have no doubt there were numerous exhibits in the case of Thurston against Bishop. What has that got to do with the Territory against Hutchinson Sugar Co.?

(Argument.)

Mr. LIGHTFOOT.—The purpose is to show that there are other schedules of unassigned lands in the same batch of papers [194—127] from which Exhibit 1 was taken that shows Kioloku as an unassigned land.

Q. I show you one of the papers taken from that, and there is a writing at the bottom of that paper. Do you know that writing; do you recognize that writing?

Mr. ROBERTSON.—I object to the question until I have an opportunity to see it.

(Shown to counsel.)

Object to it as irrelevant and immaterial and not properly identified.

(Testimony of Robert C. Lydecker.)

Mr. LIGHTFOOT.—When I speak of “that writing” I mean the words (reads) and written also in pencil, “Area 2087 acres.” Do you know whose writing that was? A. Yes, sir.

Q. Whose was it?

A. Professor W. D. Alexander.

Mr. LIGHTFOOT.—I offer this paper in evidence, if the Court please, coming—at least I offer a certified copy of the paper in evidence.

The COURT.—As I understand that is offered for the purpose of showing that Kioloku was unassigned.

Mr. LIGHTFOOT.—Unassigned.

The COURT.—And so mentioned on the paper?

Mr. LIGHTFOOT.—Yes, your Honor.

The COURT.—Objection is overruled.

Mr. LIGHTFOOT.—I will offer the certified copy. (Reads.)

The COURT.—You object to this, do you?

Mr. ROBERTSON.—Why, certainly, your Honor.

Mr. LIGHTFOOT.—It is on exactly the same basis as Exhibit 1.

The COURT.—Isn’t this signed?

Mr. LIGHTFOOT.—No, your Honor, the letter was signed but the [195—128] list of lands is not signed in Exhibit 1.

The COURT.—I admitted it the other day on the theory that it was attached to the report.

(Argument.)

Mr. LIGHTFOOT.—Anyhow, the case, as I un-

(Testimony of Robert C. Lydecker.)

derstand it, is this: There is the Alexander letter, saying "I submit herewith a list of lands," and there is in the same batch of papers several lists of lands, of which counsel has selected one. That the one selected by counsel was no more attached to the letter than is this one, but was a part of the whole bunch of papers; therefore, if the other list of lands was admissible, then this is admissible.

Mr. ROBERTSON.—I will have to ask counsel to withdraw his statement that counsel, meaning me, selected the lists that were attached to that letter. I did nothing of the kind and counsel is talking about something I know nothing about, evidently.

(Argument.)

I ask that counsel be required to retract his statement that counsel—meaning me—selected the list attached to the exhibit. It is untrue, your Honor.

Mr. LIGHTFOOT.—I didn't mean to impute that there was any wrongful selection, but there were several lists there in that record—

Mr. ROBERTSON.—I insist on my point. I insist that the statement of counsel be withdrawn, because it is untrue.

(Argument.)

Counsel is dodging. I insist that the Court make him withdraw that statement or else prove the truth of his assertion.

Mr. LIGHTFOOT.—Well, I will prove the truth of what I say. [196—129]

Mr. ROBERTSON.—Go ahead and prove it.

(Testimony of Robert C. Lydecker.)

Mr. LIGHTFOOT.—And if I am mistaken I will withdraw the statement.

Q. Mr. Lydecker, at the time that you certified to the copy of the letter of Mr. Alexander with the —with a list of unassigned lands, being Defendant's Exhibit No. 1, were there or were there not in the same bunch of papers several other lists of unassigned lands of which the one last offered in evidence was one?

Mr. ROBERTSON.—I object to the question—

A. No.

Mr. ROBERTSON.— —as irrelevant and immaterial and counsel is still dodging. He is undertaking now to prove the truth of his statement that I went over there and selected certain lists. Let him prove his statement and get at the truth of this—

The COURT.—I permit the question.

The WITNESS.—What was the question?

(Question read by reporter.)

A. There were not. This paper is entirely separate from this—this list here; nothing—

Mr. LIGHTFOOT.—Q. What do you mean when you say “this”? That doesn't convey to the reporter or the record here, Mr. Lydecker—

A. Well, I mean that this letter of Professor Alexander's and the four enclosures were not included with this bunch of papers that I have here on the table from which this is taken from.

Q. That is, the last exhibit? A. Yes.

Mr. LIGHTFOOT.—Then I withdraw the state-

(Testimony of Robert C. Lydecker.)

ment. I was under misapprehension in the matter. I had understood from Mr. [197—130] Lydecker that the whole—all the papers were together as they were together when I saw them the other day.

The COURT.—Now the question comes as to whether or not this is admissible or not.

Mr. ROBERTSON.—Our objection is that it is irrelevant and immaterial, incompetent, has no bearing on any issue in this case, not been properly identified and, therefore, should not be admitted. We make special objection, if the court please, to the certification of Mr. Lydecker as being in improper form. The certificate there is (Reads)

The COURT.—I think myself it is objectionable. It should certify that the foregoing is a true copy of what he finds there and not express any opinion as to it.

Mr. LIGHTFOOT.—I think perhaps that is well taken. May I have that certificate amended? That is was merely—

The COURT.—I think the certificate upon its face is objectionable because the librarian is expressing his opinion about matters which are in litigation.

The WITNESS.—It was put in that form to identify it as being with this batch of papers, otherwise I would merely certify it was a paper on file in the archives.

(Argument.)

The COURT.—Well, the objection is sustained, anyway, as it now stands.

Mr. LIGHTFOOT.—We offer to prove, may it

(Testimony of Robert C. Lydecker.)

please the court, that there is in the custody of the Archives, Board of Archives, whatever the term is, a document entitled, "List of unassigned lands occupied by private parties without any title from the Government," in which is included, under the title W. G. Irwin & Co., the land of Kioloku, in Kau, Hawaii, 834 Acres, and at the foot of which there is a writing by Professor Alexander [198-131] which has been identified as the writing of Professor Alexander—

The COURT.—But no signature?

Mr. LIGHTFOOT.—Not signed, no.

Mr. ROBERTSON.—He is simply offering again the document your Honor just ruled on, as I understand it.

The COURT.—Well, there is no question, Mr. Lightfoot, but what you have a right to prove, if you can, by a proper document, that the land in question is unassigned land, but I couldn't admit this in evidence.

Mr. LIGHTFOOT.—I ask that it be marked for identification.

The COURT.—Very well, this will be marked for identification.

Mr. LIGHTFOOT.—Q. I will ask you, Mr. Lydecker, if you have a paper endorsed "Re unassigned lands, L. 2602, Exhibit "D," Thurston versus Bishop, May 1st, 1888, H. S. list of Unassigned Lands. This copy was substituted on May 24th, 1888, for the written one then on file by permission of Mr. Justice Dole. S. J. H. Reist, Second

(Testimony of Robert C. Lydecker.)

Deputy Clerk"? A. Yes, sir.

Q. Will you produce it, please?

(Shown to counsel.)

Mr. LIGHTFOOT.—I offer in evidence, may it please the Court, a certified copy of the portions of this instrument that we rely upon, not being the complete copy of the whole thing, the other being immaterial.

The COURT.—What is the instrument?

Mr. LIGHTFOOT.—It is entitled: "List of lands omitted in the Mahele of 1848, Island of Hawaii, District of Hilo, etc., and the District of Hamakua, etc., and further and in the same document estimated area of unassigned lands Island of Hawaii, etc., in which list of lands omitted in the Mahele of 1848 the land of Kioloku is included. [199—132]

The COURT.—By name? Mentioned by name?

Mr. LIGHTFOOT.—Yes, and in the other list, estimated area of unassigned lands, Kioloku is included; that being in this—there is in this paper some count of leaseholds that have nothing to do with the case at issue and so we didn't have that certified.

Mr. ROBERTSON.—No objections to the form of the certificate in this instance, but I object to the exhibit offered on the ground that it is irrelevant, incompetent and immaterial, having no bearing on any issue in this case, and on the further ground that the list was not identified and does not purport to be a list compiled by anyone having

authority to make up such a list. Furthermore, that it is—

The COURT.—Not signed by anyone?

Mr. ROBERTSON.—And the additional objection that the document, if it is really what it purports to be, comes from the wrong source; in other words, this purports to be endorsed as an exhibit filed in the case of Thurston against Bishop—

The COURT.—What is it doing over there?

Mr. ROBERTSON.—Well, that is just exactly what I say; there is something wrong here. If that was really an exhibit in the case of Thurston against Bishop it would be in the archives of this court, not over in the Public Archives of the Executive Department.

(Argument.)

The COURT.—I don't believe that is admissible, Mr. Lightfoot, I sustain the objection on the ground that there is nothing upon the paper which is authoritative. It is not signed by anyone and—

Mr. LIGHTFOOT.—Well, I ask leave, may it please the Court, that the portion—

The COURT.—It is nothing more or less than a mere “scrap of [200—133] paper” as the Germans would say.

Mr. LIGHTFOOT.—Yes. I don't like that term. I ask that the certified portions referred to be marked for identification.

The COURT.—Very well; mark that for identification.

Mr. LIGHTFOOT.—That's all, thank you.

**Testimony of S. M. Kanakanui, for Petitioner.
(In Rebuttal).**

S. M. KANAKANUI, a witness recalled on behalf of the petitioner in rebuttal, testified as follows:

Direct Examination by Mr. LIGHTFOOT.

Q. Mr. Kanakanui, you are a Hawaiian, are you not? A. I am.

Q. And you are familiar with Hawaiian words?

A. Yes, sir.

Q. And familiar with the terms used in surveying? A. Yes, sir.

Q. What have you to say with regard to the use of the word konohiki in surveys?

Mr. ROBERTSON.—I object to it on the ground—

Mr. LIGHTFOOT.—Q. What does it mean?

Mr. ROBERTSON.—I object to it as too general, irrelevant and immaterial.

The COURT.—Objection overruled. What's your answer?

A. It had been used as a general—

Q. The question is, what is your understanding?

Mr. LIGHTFOOT.—Yes.

The COURT.—Q. What is your understanding of that term?

A. "Konohiki" in a survey of Kuleanas, isn't it? [201—134]

Mr. LIGHTFOOT.—Yes.

A. Or the term "Konohiki"—

(Testimony of S. M. Kanakanui.)

Q. As used in the survey of kuleanas.

A. Generally used as the landlord of the adjoining land, either Government land or crown land or konohiki land.

The COURT.—Q. Would Government land be— For instance, a kuleana situated within Government land, now which form of boundaries— Would you say the Government land was “konohiki”?

A. Were used by surveyors as “Konohiki” too; generally used.

Mr. LIGHTFOOT.—Q. You know of instances in which the word konohiki has been used as the boundary of a kuleana situate within Government or crown lands. A. Yes, sir.

Q. Are there many of such instances?

A. Oh, there are many.

Q. I will just ask you the general question, do you know of any specific instances?

Mr. ROBERTSON.—Objected to as irrelevant, incompetent and immaterial.

(Argument.)

Mr. LIGHTFOOT.—I take it, the objection will be sustained?

The COURT.—Sustained, on the ground it is already asked and answered.

Mr. LIGHTFOOT.—Q. Have you with you a record of a petition of Kealaha-ai for the registration of the boundaries of an ahupuaa called Waiamau?

Mr. ROBERTSON.—Objected to as incompetent, irrelevant and immaterial, having no bearing on

(Testimony of S. M. Kanakanui.)

any issue— A. I have.

Mr. ROBERTSON.—Having no connection with the land of Kioloku.

The COURT.—Where is it pertinent? [202—135]

Mr. LIGHTFOOT.—I will state the object of my proof—offer of proof. I think that it comes within the ruling of your Honor on a former occasion, but I may be in error in that. We offer to prove that, after the decision of the case of Thurston, Minister of the Interior, against Bishop —— No, let me withdraw that. We offer to prove that there was a piece of land situate in the District of Kau by name of Waiamau; that this land was maheled or divided in the Great Mahele of 1848, and set apart in that Mahele to Kealoha-ai; that Kealoha-ai failed to present his claim to Waiamau before the Land Commission in the time required by law, and also failed to get a grant of the Minister of Interior, which was provided for under the Act 1860 for the relief of Konohikis who had failed to file their claims before the land commission, which claims had been decided in the Mahele; that he had failed to take advantage of the Act of 1860, that thereafter Kealoha-ai, to whom the land of Waiamau had been set aside in the Mahele, applied to the land Commission—applied to the boundary commission for a certificate of boundaries of this same land—

The COURT.—That he had failed to—

Mr. LIGHTFOOT.—That he had failed to—

The COURT.——present his claim—

Mr. LIGHTFOOT.—Present to the land board,

(Testimony of S. M. Kanakanui.)

and that a certificate was issued to him, and thereafter he went to the legislature of 1890 and secured from the legislature the passage—went to the legislature and secured from the legislature the enactment of a law granting this land of Waia mau to him, in spite of his failure to present the land maheled to him before the land commission. That is the object of the present question.

The COURT.—What bearing has that on this case? [203—136]

Mr. LIGHTFOOT.—That is a case that is on all-fours with this case. It is a similar case.

The COURT.—Is it for the purpose of showing that the claimants of the land in question could have done likewise?

Mr. LIGHTFOOT.—Yes, that they could have done likewise, but having failed to do that they have no more claim by reason of the certificate of the boundary commission than they would have had without it.

The COURT.—I understand you further to offer that this was set aside to someone and they failed to present their claim,—this land in question?

Mr. LIGHTFOOT.—This land of Kioloku? No, your Honor, this is another land altogether.

Mr. ROBERTSON.—We object to the offer, your Honor.

The COURT.—Objection sustained.

Mr. LIGHTFOOT.—That's all.

Cross-examination by Mr. ROBERTSON.

Q. Mr. Kanakanui, after the Mahele—from and

(Testimony of S. M. Kanakanui.)

after the Mahele, when the ahupuaas were divided off to the chiefs, the chiefs then became the konohikis of the ahupuaas which were divided off to them, did they not?

A. Not in a strict sense; not until after the dissolution of the land commission; then they are legally known as konohiki land. Between the Mahele—

Q. You explain it then.

Mr. LIGHTFOOT.—Let's have the rest of the answer.

The COURT.—Go ahead.

A. Between that Mahele of 1848 and the dissolution of the land commission the land standing in the name of those konohikis by the Mahele are subject to a division to be given to the [204—137] Government, one-third of their lands.

Mr. ROBERTSON.—Q. But that was taken in money commutation—?

A. No, it was taken in land.

Q. Oh.

A. And those lands were set apart by those konohikis as a Government commutation to the rest of their lands.

Q. The COURT.—Q. When was this land commission dissolved?

A. In 1854. The sentiment prevailing at the time of the Mahele, these chiefs were termed "Konohiki, superior landlord.

Mr. ROBERTSON.—Q. How old are you? What year were you born in?

(Testimony of S. M. Kanakanui.)

Mr. LIGHTFOOT.—Q. Was that all you had to say on that subject, Mr. Kanakanui, or had you just taken breath?

Mr. ROBERTSON.—I want to know what year he was born in, now.

Mr. LIGHTFOOT.—I submit we are entitled to the whole of the answer. It is not finished.

The COURT.—Q. Have you anything further to say in answer to the question? Had you finished your answer? A. No, I did not.

Q. Had not finished?

A. I had not finished.

Q. All right, finish your answer.

A. You mean answer to his question, how old—when I was born?

Q. Had you finished your answer to his question?

Mr. ROBERTSON.—He has not answered my question. The question is already answered; he was going into a general discussion that is not called for by the question at all. The question now is, how old, or when were you born?

Mr. LIGHTFOOT.—I submit the previous question is not answered.

The COURT.—He said he had nothing further to say. [205—138]

Mr. ROBERTSON.—The question is answered, with great fullness.

Mr. LIGHTFOOT.—I understand him to say that his answer was not complete.

The COURT.—Q. Well, is it complete or is it

(Testimony of S. M. Kanakanui.)

not? Have you got anything further to say in answer to Judge Robertson?

A. Well, I am going to tell him, to answer him.

Q. All right. The question now is, when were you born?

A. I was born in November the 5th, 1864.

Mr. ROBERTSON.—Q. Yes, ten years after the land commission was dissolved.

A. And I am pretty near 54 years old.

Q. Yes. Now, I will ask you the same question I asked Mr. Wall: Here's the case of the Ahupuaa of Honuapo, awarded to W. C. Lunalilo by Land Commission Award 8559B, Apana 13. Upon that award to Lunalilo he became the konohiki of the Ahupuaa of Honuapo, didn't he?

A. Upon that award, yes.

Q. Yes, and that is so as to the awards of other ahupuaas, to other awardees in general?

A. That is.

Q. When they received their award they become the konohikis of the ahupuaa, isn't that so?

A. They were konohikis before.

Q. They were konohikis, then, before that, but they were—but they may have been dispossessed by reason of the division in the Mahele, isn't that so? In other words, prior to the Mahele, a certain chief may have been konohiki of a certain ahupuaa, but in the division of the Mehele that ahupuaa may have been divided to some other chief, mayn't it?

A. Yes. [206—139]

Q. So that the first chief then ceased to be the

(Testimony of S. M. Kanakanui.)

konohiki of that ahupuaa? A. Yes, sir.

Q. Yes. But when he went before the Land Commission and got his award for that ahupuaa, then he became the konohiki of that ahupuaa for sure, didn't he?

A. The term "Konohiki" is—it is inferior.

Q. What?

The COURT.—Inferior.

A. His position—Lunalilo's position really, in fact, is not a konohiki—

Mr. ROBERTSON.—Q. You mean under Land Commission Award No. 8559B?

A. Yes, although it was stated "konohiki land," but the term "konohiki" is a little lower than the ownership of the land.

Q. Yes, but now, Kanakanui, you are referring to the ancient meaning of the term, prior to the Mahele, are you not? A. Yes.

Q. Yes; but since the Mahele the awardees of the ahupuaas have themselves been called the konohikis, haven't they?

A. After they secured their awards?

Q. Yes. A. Yes.

Q. And from that time on they have been properly called the konohikis of their respective ahupuaas? A. Yes, sir.

Q. What is the correct and proper term, Hawaiian term, applicable to Government land?

A. Aina aupuni.

Q. So that, if a kuleana is bounded on one or more sides by Government land, it is proper, in

(Testimony of S. M. Kanakanui.)

the old Hawaiian description [207—140] of the kuleanas, to say that it “runs along aupuni”; that is a correct description and use of the term, is it not?

A. If the kuleana included inside of Government land.

The COURT.—Well, that is the question, if it borders on Government land.

A. Yes, Yes, that is correctly represented.

Mr. ROBERTSON.—Q. Yes. In other words, if, at the time a kuleana is awarded, it is situated within a Government ahupuaa, it would be a correct description of that kuleana to show that it was bounded by “Aupuni”? A. Yes, sir.

Q. Yes; and if a kuleana, on the other hand, is situated within an ahupuaa that had been awarded to a chief, then the proper description would show the land bordering or surrounded—bordering on or surrounded by konahiki land? A. Yes.

Q. That would be correct, wouldn't it?

A. Yes.

Q. And if a different use should be made of either of those words, konohiki or aupuni, it would be either a mistaken or an incorrect use, would it not?

The COURT.—That is, the kuleana is in the Government land.

Mr. ROBERTSON.—Q. You wouldn't say surrounded by—if they used the word “konohiki” it would be considered a mistake or misuse, wouldn't it?

A. No; no, that all depends—

(Testimony of S. M. Kanakanui.)

Mr. LIGHTFOOT.—Do I understand—

A. It all depends on the knowledge of ownership acquired by the surveyor that going on the ground at the time.

Mr. ROBERTSON.—Q. Yes, I understand your point, but you don't get my point. I am not talking about the use of terms as they [208—141] have in fact been used by different surveyors; I am asking you now as an expert in the Hawaiian language, what is the correct use of the word? In other words, if a kuleana is situated within a Government ahupuaa, it would be incorrect in describing that kuleana to say that it was surrounded by konohiki land, isn't that so?

A. No, no, it is not wrong.

Q. Let me put it the other way, then; If a kuleana is situated within an ahupuaa that has been awarded to some chief who has obtained title to it and it has thereby become a konohiki land, wouldn't it be incorrect in describing that kuleana to show that it was surrounded by aupuni land?

A. Yes, it is wrong.

Q. But you deny that the rule works the other way, do you? A. Yes, sir.

Q. As a matter of fact, what's the four classifications of the lands of this Territory, as shown in the archives of your own office to-day, and what has it always been? Has it not been Government land, crown land, konohiki land and kuleanas?

A. Oh, not in the sense you are driving at. If you follow me, after the Mahele of 1848 and during

(Testimony of S. M. Kanakanui.)

the operation of the Land Commission all lands were under the konohikis and they were generally terms as "Konohiki" land—

Q. I am not thinking about that. You probably misunderstand me now.

Mr. LIGHTFOOT.—May we not have the answer?

Mr. ROBERTSON.—You have had it.

The COURT.—Q. Have you anything further to say, or have you finished your answer?

A. After the Mahele of 1848 the basis of title begin to [209—142] change and go into the Government, some a new name; some land went to the Government, gone in a new—new class, which has never been commonly known before that, and if there was a surveyor went and surveyed kuleanas within those lands, not knowing that, just prior, it was turned over to the Government, he may mention "along konohiki," which was the section known prior to 1848.

Mr. ROBERTSON.—Q. Yes, now I get you; so that your last answers here have had reference to the period prior to the Mahele, isn't that so?

A. No, the general section, that word konohiki as referred to around kuleanas within Government lands.

Q. Up to what year? A. Up to 1854.

Q. Up to 1854. All right, now I get you; and these answers that you have recently given here, these last two or three answers, have had reference to a period prior to 1854? A. Yes. sir.

(Testimony of S. M. Kanakanui.)

Q. Yes. Please eliminate that. I am talking now from 1854 down to date. As shown by the archives in the survey office of this Territory, aren't the lands divided into four main classes,—Government land, crown land, konohiki land and kuleanas?

A. And unassigned lands.

The COURT.—Q. What would unassigned lands be, but Government lands? Wouldn't unassigned land be Government land?

A. Yes, be considered Government land.

Mr. ROBERTSON.—Q. I am not talking about these subdivisions, such as school lands or fort lands, or unassigned lands. I ask you again if the records in your office, from 1854 down to date, [210—143] do not show the classification I have repeatedly specified here to you, in four main classes, Government land, crown land, konohiki land and kuleanas? A. Yes, sir.

Q. Each a separate class of its own?

A. Yes, sir; of which two of those classes merge into one later.

Q. That is, Government land and crown land?

A. Yes.

Q. Being all now public lands? A. Yes, sir.

Q. And including, you might say, what the Government claims by way of unassigned lands?

A. Yes, sir.

The COURT.—Q. So then there are only three general divisions at the present day?

A. Yes, sir.

Mr. ROBERTSON.—Q. That would be public

(Testimony of S. M. Kanakanui.)

land, konohiki land and kuleana? A. Yes, sir.

Q. Now, I am now referring to a time subsequent to 1854. Take an ahupuaa of Government land, and a surveyor undertakes to describe a kuleana situated within that Government ahupuaa, the proper way to describe that land would be to designate the boundaries as running along aupuni land, wouldn't it be—

A. The kuleana survey closed after—prior to 1854.

Q. O, well, don't bother about dates; I don't care whether it is '53 or '54 or '55; since the time of the land commission, since the land commission has closed, if a kuleana is sought to be surveyed off and described within a Government ahupuaa, [211—144] the proper way to describe those boundaries is to specify "running along aupuni," isn't it?

A. I want you to make it plain. Was it the re-survey of those kuleanas that were surveyed or before, or a survey of new kuleanas after '54?

Q. Either.

A. In 1854—after 1854, there were no kuleanos surveyed.

Q. No original surveys made?

A. Oh, the survey was made and filed and the award had been given, and some had been awarded and some had been denied.

Q. I see, and there were no new surveys of the kuleanas after 1854?

A. After the close of the land commission there

(Testimony of S. M. Kanakanui.)

were no kuleana surveys made.

Q. Well, you don't answer the point here now. I am not talking about the actual making of any surveys; I am asking you, as an expert in the Hawaiian language, as to the correct and proper use of the term. If a kuleana situated within a Government ahupuaa is surveyed and described, isn't the correct term to use, as showing along what land the boundaries of the kuleana run, to use the word "Aupuni"?

A. I don't understand you. That is, a retrace or—of the survey made prior—?

Q. No, I am talking about an original survey of a kuleana in a Government ahupuaa. Now, if you use the correct term as indicating the character of the land surrounding that kuleana, the correct and appropriate term to use is the Hawaiian word "Aupuni," isn't it?

A. Yes, of they are now, yes.

Q. Yes. Now, then, if a kuleana is being surveyed within [212—145] an ahupuaa that has been awarded to some chief, then the proper word to use in indicating along what land the boundaries of that kuleana run, the proper word and the correct word to use is the word "konohiki," is it not?

Mr. LIGHTFOOT.—We object to that.

The COURT.—Objection is overruled.

A. It was proper to define "along konohiki."

Mr. ROBERTSON.—Q. Konohiki?

A. Yes, sir.

Q. In other words, those two words, aupuni and

(Testimony of S. M. Kanakanui.)

konohiki, were used for the very purpose of distinguishing between an ahupuaa that had passed into private ownership, the private ownership of a chief by an award, and an ahupuaa, on the other hand, the title to which was retained by the government in the Mahele?

A. It was proper. It was proper, but it was proper also, at the time, to surround by konohiki, of kuleanas within Government land.

Q. Well, that would only be so in case that an award of the ahupuaa had not been made?

A. Well, all depends on the knowledge of the surveyor that went on the ground and surveyed it.

Q. I see, and also depend on the accuracy of his knowledge as to whether he was mistaken or not?

A. Yes.

Q. In other words, in surveying, making a survey, an original survey of an old kuleana, the surveyor who made it may have been mistaken in his understanding as to whether the ahupuaa in which that kuleana was situated had been awarded to a chief and become konohiki land, or whether it remained in the Government? A. Yes. [213—146]

Mr. ROBERTSON.—That's all.

Mr. LIGHTFOOT.—There is one matter that I have omitted inadvertently. I would like to get in the—a certified copy of the Mahele to Ane Keohokalole—Would you have any objection to my filing one after the proof?—Have the Mahele Book?

A. Yes, sir.

(Testimony of S. M. Kanakanui.)

The COURT.—Which one is it—this big one?

Mr. LIGHTFOOT.—I want to show the Mahele between the king and Ane Keohokalole, so that I can put in a certified copy of the mahele.

The COURT.—And it shows the land that was—

Mr. LIGHTFOOT.—Set aside for the king, on the one side, and set aside to Ane on the other.

Mr. ROBERTSON.—That is properly a part of their case in chief.

Mr. LIGHTFOOT.—Properly a part of our case in chief, but it was, through an inadvertence, not included.

Mr. ROBERTSON.—Well, I will agree to let them open on their redirect for the purpose of admitting that exhibit, if they will admit something that I have—ought to have proved, I think; that is, that all the parties to the partition deed of 1870 have since died.

Mr. LIGHTFOOT.—We will admit that they have all gone over.

The COURT.—All the parties to the partition deed?

Mr. ROBERTSON.—This deed of 1870. They have all died; that is, Liliuokalani, and Ruth and Likelike—

The COURT.—That all the parties who executed the partition deed are now dead?

Mr. LIGHTFOOT.—Yes.

The COURT.—The record will show that. [214—147]

(Testimony of S. M. Kanakanui.)

MR. ROBERTSON.—I do not object to their putting in a certified copy of the Mahele to Keohokalole. I would like to cross-examine Mr. Kanakanui, a question or two.

THE COURT.—I would like to understand the purpose of it so as to follow you.

MR. LIGHTFOOT.—The purpose is this, to show—It was practically admitted on our case in chief, but we want, among other things, to fix the date of this mahele, if we can. The other side is relying upon the presumption of a lost deed. We want to show that here at this date, the Mahele, there was a divisions of lands between the king and Ane Keohokalole, some being set out to the king and some being retained by Keohokalole, in which the land of Kioloku is not mentioned as either being set off to the king or retained by Ane; in other words that it is not in the Mahele.

THE COURT.—It does not mention other lands that were set off to her?

MR. LIGHTFOOT.—Mentions other lands, yes, your Honor, but not this.

THE COURT.—Is there any mention of the land in question ever having been awarded or set off to any person?

MR. LIGHTFOOT.—No.

Q. Just refer to that page, will you, the Mahele, Ane Keohokalole—

MR. LIGHTFOOT.—Could it be read into the record?

MR. LIGHTFOOT.—Q. What is the book which

(Testimony of S. M. Kanakanui.)

you now hold in your hand, Mr. Kanakanui?

A. The book that contains the maheles of land between the king and chiefs. [215—148]

Q. In 1848? A. In 1848.

Q. What is this book?

A. It is a record of the land office.

Mr. ROBERTSON.—Q. Is that the original or a copy?

A. Original.

Mr. LIGHTFOOT.—Q. Now will you turn to the Mahele of Ane Keohokalole. What page is it on?

A. On page nine and page ten.

Q. What is the date of it?

A. January 28th, 1848.

Q. Now will you read what you find, any entries under that account—under that mahele. First the lands awarded—retained by the king.

A. For Kamehameha Third. The title on the top, Lands, Ahupuaa. Kalana, Mokepuni—

Mr. ROBERTSON.—How many are there?

A. Oh, it reads about 70, I think.

The COURT.—Perhaps a certified copy will be better.

Mr. LIGHTFOOT.—Perhaps a certified copy will be better. We will have that prepared and put in the record. It is unnecessary to read this. It is offered for the purpose of showing that the land in question was not one of those awarded to her.

The WITNESS.—That's the object.

Mr. ROBERTSON.—Q. In other words, Mr. Kanakanui, the mahele record which you have in

(Testimony of S. M. Kanakanui.)

your hand there shows a division of a number of pieces of land as between the king, Kamehameha the Third, on one side, and Ane Keohokalole on the other? A. Yes, sir. [216—149]

Q. About how many pieces were set aside to the king in that division? About how many; not exactly but roughly speaking?

A. About forty-five.

Q. About forty-five pieces of land.

A. Yes, sir.

Q. Was the land of Kioluku included in the list of the lands that the king reserved to himself in his division with the chiefess Keohokalole?

The COURT.—Q. This land here, Kioloku, was that reserved to the king?

A. It was not reserved. It is not contained in the list.

Mr. ROBERTSON.—Q. And neither is it mentioned in the list of lands divided off to the chiefess?

A. To Keohokalole?

Q. Ahhuh.

A. To Keohokalole?

Q. Yes. She was a chiefess, wasn't she?

A. Yes.

Q. Well, answer the question. Is the land of Kioloku mentioned in the list?

A. It was not.

Q. How many pieces of land were set off to Keohokalole in that mahele?

A. About thirty-eight.

Q. Thirty-eight; so that the land of Kioloku is

(Testimony of S. M. Kanakanui.)

not mentioned in either list, either that reserved by the kind or in that divided off to Keohokalole?

A. It isn't.

Q. Do you know whether or not there was any other division between [217—150] the king and Keohokalole besides the one you just referred to?

A. Yes, sir.

The COURT.—Q. There was another?

A. Yes, sir.

Mr. ROBERTSON.—Q. Where is it? Is there a record of that? A. Not here.

The COURT.—Q. But there is a record?

A. But there is a record. The division between Keohokalole and the Government.

Mr. ROBERTSON.—Q. Oh, that is—

A. An entire—

Q. You mean between Keohokalole and the Government as distinguished from the division between Keohokalole and the King himself? A. Yes, sir.

The COURT.—Well, wouldn't that show us something? Might show us something.

Mr. ROBERTSON.—I don't know.

The COURT.—Have you examined it, Mr. Lightfoot?

Mr. LIGHTFOOT.—I have not examined it myself, your Honor.

The WITNESS.—I have. I didn't find it contains anything there.

The COURT.—Q. Didn't find that it was reserved by the Government nor awarded to the chiefess?

A. Yes.

(Testimony of S. M. Kanakanui.)

Mr. ROBERTSON.—Q. So that in the other division that you refer to between Keohokalole and the Government the land of Kioloku is not mentioned on either side, is that it?

A. Yes, sir. [218—151]

The COURT.—Q. You are sure of that, Mr. Kanakanui? A. Yes, I am sure.

Q. Well, now, was there any other division between the king and the chiefess that you refer to, or the Government and the chiefess that you refer to? A. No more division.

Q. You know of no other?

A. No, I know no other.

Mr. ROBERTSON.—Q. There may have been some other that you can't find at the present time, isn't that so? There may have been another mahele or division that you can't find any trace of at the present day?

A. I am sure there is no other.

Q. Well, you don't know that positively, do you?

Mr. LIGHTFOOT.—I object to it. He has already answered.

The COURT.—Let's find out.

Q. Have you made search for another, Mr. Kanakanui?

A. Well, in two important division, in—in perfecting titles of konohikis, they were the division of the kind and the division of the Government. Besides that there is no other division.

Mr. ROBERTSON.—You mean to say there is no other that you know of?

(Testimony of S. M. Kanakanui.)

A. None I know of.

Q. Yes, but whether or not there was some division of which you can't find record at the present day you don't know, do you?

A. There might have been; there might have been another division, but up to now I don't know of any division.

Q. Yes. Now, as a matter of fact, Mr. Kanakanui, didn't the chiefs in some instances go before the land commission and [219—152] obtain awards of ahupuaas which are not mentioned in any mahele between them and the king or the Government?

A. I never came across one. I came across a petition by the chiefs to the land commission to settle house lots but I never came across one where a—konohikis had been awarded them, their land had been divided with the king as for other land than those lands contained in the mahele.

Q. I see.

A. I never come across one. There might have been one I don't know.

Mr. ROBERTSON.—Exactly. That's all.

Mr. LIGHTFOOT.—That's all. We rest.

The COURT.—Any further evidence?

Mr. ROBERTSON.—No, your Honor, no further evidence.

I hereby certify the above and foregoing to be a complete and accurate extension of my shorthand notes of the proceedings had and testimony taken

during the trial of the above-entitled cause.

(Sgd.) JAMES L. HORNER,

Official Reporter.

Land Court.

Filed Thursday, Aug. 14, 1919, at 2:00 o'clock
P. M.

ARTHUR E. RESTARICK,

Registrar.

[Endorsed]: No. 1212. Rec'd and Fled in the
Supreme Court, August 14, 1919, at 2:00 P. M.
J. A. Thompson, Clerk. [220]

In the Supreme Court of the Territory of Hawaii,
October Term, 1919.

No. 1212.

In the Matter of the Petition of the TERRITORY
OF HAWAII to Register and Confirm Its
Title to the AHUPUAA OF KIOLOKU, in
the District of Kau, Island and County of
Hawaii, Territory of Hawaii.

ERROR TO JUDGE OF THE LAND COURT.

Opinion.

Hon. J. T. DE BOLT, Judge.

Argued January 28, 1920, decided March 15, 1920.
COKE, C. J., KEMP AND EDINGS, JJ.

Real Actions—Statute of Limitations Distinguished
From the Common-law Presumption of a Lost
Grant.

There is a marked difference between a title ac-

quired by prescription under the statute of limitations and a title acquired through the medium of the common-law presumption of a lost grant.

Same—Same.

Under the statute of limitations the rule is an arbitrary one and the presumption is conclusive, whereas the common-law presumption is rebuttable.

Same—Same.

The statute of limitations cannot be invoked against the State but where sufficient facts are shown the common-law presumption of a lost grant may be indulged in and the rule will be applied as a *presumptio juris et de* [221] *jure* even as against the State.

Same—Common-law Presumption of a Lost Grant.

Where the evidence is sufficient to apply the common-law presumption of a grant it may also be assumed in the absence of circumstances repelling such conclusion that all that might lawfully have been done to perfect the legal title was in fact done and in the form prescribed by law.

Same—Same.

The doctrine of the common-law presumption of a lost grant may be invoked in favor of the State as well as against it. [222]

OPINION OF THE COURT BY COKE, C. J.

This cause is brought here on a writ of error sued out by the Territory of Hawaii to review numerous rulings of the judge of the land court of the Territory of Hawaii made during the trial of said cause as well as the final decision and decree made and rendered therein. There are in all twenty-five specifications of

error. The controversy is in respect to what is known as the Ahupuaa of Kioloku, District of Kau, island of Hawaii. This ahupuaa contains an area of about 850 acres. In August, 1913, the Territory of Hawaii sought to have its title thereto registered. After a report by the examiner which was favorable to the claim of the Territory notice was served upon adjoining owners and possible claimants as provided by law. The Hutchinson Sugar Plantation Company (hereinafter referred to as the company), the present defendant in error, was the only party appearing to make claim to the property in question. It interposed an answer denying title in the Territory and asserted ownership of the land in fee simple in itself. The trial of the issue thus joined was not commenced until October, 1918.

It is the claim of the Territory that the Ahupuaa of Kioloku was not included in the great mahele of 1848 by which the lands of the Kingdom of Hawaii were supposed to have been partitioned and set apart in severalty to and between the king, the chiefs and the Government, respectively, nor has the Government by any subsequent award or grant conveyed away its title in said ahupuaa. The company asserts title in fee simple in itself under a mahele and land commission award which cannot now be produced and of which no present record can be found but which it claims must be presumed to have been made to the high chiefess Ane Keohokalole and invokes the common law presumption of a grant and attempts to establish its claim of the existence of the grant [223] by secondary evidence.

The facts involved in the controversy are simple. The predominant question is whether under the facts and circumstances shown to exist by the record a grant from the Government to Ane Keohokalole can properly be presumed. As aptly said in the brief of the attorney general: "The whole issue of the case may be summarized in the one question, namely, under the facts and circumstances as shown in the case, will the court presume a grant of Kioloku to Ane Keohokalole?" The judge of the land court found after an able and exhausted review of the evidence as well as of the authorities that a grant from the Government to the company's predecessor in interest must be presumed and that the petitioner, the Territory of Hawaii, had no right, title nor interest whatsoever in or to Kioloku and thereupon dismissed the petition of the Territory.

At the trial before the land court it was established either by evidence or the admission of the parties that Caezar Kapaakea was the father and Ane Keohokalole the mother of David Kalakaua (afterwards King Kalakaua); that as far back as 1861 Ane Keohokalole, through her trustees C. R. Bishop, was collecting rents from the ahupuaa of Kioloku; that Ane Keohokalole died in 1869 leaving surviving her David Kalakaua and three other children; that in 1870 the lands of Ane Keohokalole were partitioned and divided between her children by a deed of partition duly executed and recorded and that by this deed the ahupuaa of Kioloku was set apart to and as the sole property of David Kalakaua; that from that date to the present time Kalakaua

and his successors in interest have held actual, open, continuous and uninterrupted possession of the land in question, using it for such purposes as it was adapted, and that the Hutchinson Sugar Plantation Company succeeded to the rights of Kalakaua by [224] several mesne conveyances. The petitioner has also admitted that the land has been assessed by the several Governments of Hawaii, to wit, the Monarchy, the Provisional Government, the Republic of Hawaii and the Territory of Hawaii, and the taxes so assessed have been paid by the successive occupants since 1870 to the present time.

The record herein further discloses that in 1873 David Kalakaua presented a petition to Rufus A. Lyman boundary commissioner for the Island of Hawaii, to have the boundaries of the ahupuaa of Kioloku and other lands settled and adjudicated. It appears from the record of the boundary commissioner that the owners of adjoining lands were notified of the proceedings as required by law and that in response to this notice the then reigning monarch of Hawaii, His Majesty King Lunalilo, owner of one of the adjoining tracts of land, appeared and was represented by J. G. Hoapili, and that the Government, the owner of one of the adjoining tracts of land appeared and was represented by W. T. Martin; that testimony was taken and a judgment defining the boundaries of Kioloku by a survey description was entered; that no objection was made to the proceedings or to the findings of the commissioner either by

King Lunalilo or by the Government. From ancient maps and surveys of lands adjoining Kioloku and of a small Kuleana located within the boundaries of Kioloku as early as 1852 Kioloku was referred to as konohiki land. Konohiki, when used as a noun, designated the person having charge of the land in behalf of the king or chief or other person to whom the ahupuaa had been assigned or awarded, but the word "konohiki" is in common use as an adjective denoting land which is privately owned in contradistinction to "aupuni" or Government land. The classification of the lands in these islands which have been in vogue since the great mahele of 1848 is (1) Government land; (2) crown land; (3) konohiki land, and (4) kuleanas of the [225] common people. In royal patent grants issued about 1860 the ahupuaa of Kioloku was referred to simply as "Kioloku" while other lands in that vicinity which it is conceded were Government lands were referred to as "aupuni."

Mr. Kananui, a witness for the Government, testified to having searched the records of the land commission and of the privy council of the former Kingdom, as well as the records of the mahele of 1848, without being able to locate any record of an award or mahele of Kioloku. And it is further shown by the Territory that Kalakaua in his petition filed with the boundary commissioner of the Island of Hawaii to have the boundaries of Kioloku and other ahupuaas adjudicated represented that no award of Kioloku had ever been made to his mother

Ane Keohokalole. The petition referred to is as follows:

“To the Honorable Rufus A. Lyman,

“Commissioner of Boundaries,

“Island of Hawaii.

“The undersigned states, that A. Keohokalole had lands, She did not receive awards from the Land Commissioner to some of her lands; but she still holds said Ahupuaas to this time,

Therefore, herewith apply to settle the boundaries of said lands, according to their names hereunder, thus

	Ahupuaas	District	Island
1.	Lililoa	Puna	Hawaii
2.	Nalua	Kau	“
3.	Kamakamaka	“	“
4.	Kapauka 5	“	“
5.	Mohokeya	“	“
6.	Kioloku	“	“
7.	Ilikahi	Kona	“

“Property owners adjoining these lands be also called to appear on the day set for action on these lands, before the Land Commisison.

“Applicant,

“(Sgd.) D. KALAKAUA.

“Honolulu, June 23d, 1873.” [226]

No living witness has been produced who was present at the proceeding before the boundary commissioner and while the statement of Kalakaua in his petition was weighty evidence supporting the claim that no award of Kioloku had been issued to his mother yet the proceedings had upon the petition be-

fore the commissioner strongly refute that assumption. Kalakaua could only have presented and sustained his petition upon the hypothesis that Kioloku had been awarded by the land commissioners or patented or deeded by the king without defined boundaries and that petitioner was at that time the owner of the land, for it was prescribed in the law authorizing the proceedings, to wit, the act of the legislative assembly of the Kingdom approved June 22, 1866, that "All owners of ahupuaas and ilis of land within this Kingdom, whose lands have not been awarded by the land commissioners, patented or conveyed by deed from His Majesty the king, by boundaries decided in such award, patent or deed, are hereby required within five years from the 23d day of August, A. D., 1868, to file with the commissioner of boundaries for the circuit in which the land is situated, and application to have the boundaries of said land decided and certified to by said commissioner," etc. (See also *Re Boundaries of Paunau*, 24 Haw. 546), and therefore great probative force must be attached to the facts that both the king and the Government although being represented at the hearing before the boundary commissioner neither interposed any objection thereto and the hearing proceeded to final determination. What took place before the boundary commissioner was entirely inconsistent with any other theory than that Kalakaua was recognized by the boundary commissioner, the king and the Government as the rightful owner of the property. It is worthy of mention here that of all the lands designated in Kalakaua's petition only

the boundaries of Kioloku were adjudicated. Why were not the boundaries of Lililoa, Nalua, Kamakamaka, Kapauku 5, Mohokea and Ilikahi also determined? The answer is not difficult in the light of the fact that these last-mentioned ahupuaas are shown not to have been the property of Kalakaua. It does not seem [227] unreasonable to assume that these facts were known at the time to the commissioner and those concerned in the proceedings had before him and hence the boundaries of only the property owner by Kalakaua were determined. For it is a fact of record that the boundary commissioner adjudicated the boundaries of Kioloku and issued his certificate thereof to Kalakaua.

The fact that Mr. Kanakanui's search has revealed the existence of no record of an award of Kioloku taken together with the recitation contained in the petition of Kalakaua constitutes the strongest circumstances in the case of the Territory. This evidence, weighty as it may seem, appears to be overcome by other facts forming a combination of circumstances which irresistibly lead to the conclusion that Kioloku had been awarded to Ane Keohokalohe, namely, the facts that she was exercising dominion over this property as early as 1861; that in the partition deed of 1870 this land was set apart to Kalakaua and in 1873 the boundaries were settled upon his application with the knowledge and acquiescence of the king and the Government; that from 1870 down to 1913, a period of forty-three years, the several successive Governments of Hawaii recognized Kioloku as the property of Kalakaua and

his successors in interest; that during this entire period no claim whatsoever was asserted by the Government or by any representative thereof to Kioloku, and during the whole period the property was assessed as the property of Kalakaua and his successors in interest and taxes were collected by the Government down to the date of the institution of this proceeding. As said in *Jover vs. Insular Government*, 221 U. S. 623, we would not be justified in assuming that the State would collect taxes on its own property.

Each party has introduced evidence supporting its theory of the case and in this respect there is some conflict in the testimony. The rule is that the findings of the trial judge will not be disturbed by review on writ of error where to do so this court would be called upon to pass upon the credibility of the witnesses or the weight of the evidence. (See 2522 R. L. 1915, as amended by Act 44 [228] S. L. 1919; *Akatsuka vs. McKay*, 24 Haw. 600, 604; *Kaleiheana vs. Keahipaka*, 23 Haw. 169, 171.) The evidence introduced on behalf of the company we deem to be sufficient to sustain the judge of the land court in presuming that a grant of Kioloku was issued to Ane Keohokalole, the grant itself having been lost or for other reasons cannot now be produced.

We will not direct ourselves to the law involved to the end that it may be determined whether in this jurisdiction the common-law presumption of a lost grant may be indulged in as against the Government. This is the vital issue and presents a question of

law never heretofore dealt with by the courts of these Islands.

The doctrine of presumptions, upon which this case must be solved, has called forth various definitions. The Supreme Court of the United States gives the following definition:

“A presumption is an inference as to the existence of a fact not actually known arising from its usual connection with another which is known.” Blackstone in speaking of the nature of evidence required to establish a presumption says: “Positive proof is always required where from the nature of the case it appears it might possibly have been had. But next to positive proof, circumstantial evidence, or the doctrine of presumptions, must take its place. For when the fact itself cannot demonstratively be evinced, that which comes nearest to the proof of the fact is the proof of such circumstances as either necessarily or usually attend such facts; and these are called presumptions which are only to be relied upon until the contrary be actually proved.” A presumption may be defined as the probable inference which common sense, enlightened by human knowledge and experience, draws from the connection, relation and coincidences of facts and circumstances with each other. When a fact shown in evidence necessarily accompanies the fact in issue it gives rise [229] to a strong presumption as to the existence of the fact to be proved. But if on the other hand the fact shown in evidence only usually accompanies the fact in issue it gives rise merely to a probable presumption of the existence of the fact to be

proved. And Greenleaf in his work on Evidence (16th ed.) section 45, in applying the doctrine of presumption to a grant as against the sovereign, lays down the rule that "though lapse of time does not of itself furnish a conclusive legal bar to the title of the sovereign, agreeably to the maxim '*nullum tempus occurrit regi*,' yet if the adverse claim could have had a legal commencement, juries are instructed or advised to presume such commencement after many years of uninterrupted adverse possession or enjoyment;" and in a note to the section quoted it is said that application of the presumption to cases where a grant was implied against the sovereign has been made in a number of cases cited and that the same principle has been upheld in the United States in favor of individuals as against the State.

Lord Coke recognized the existence of the principle and recites that an act of parliament, a grant from the crown, a deed, and in fact anything which will quiet possession may be presumed from length of time when such act, grant or deed would have been lawfully possessed, made or given, and this presumption is said to be founded on the principle that the law will not presume any man's act illegal but will attribute such possession to a legal origin; that the failure to interrupt such possession by those who had the right arose from their knowledge that it was lawful in its inception and that upon principles of public policy for quieting men in their possession. (Co. Litt. 6). In the case of the Mayor of Kingston upon Hull vs. Horner, Cowp. 102, it was left to

the jury to presume a grant or charter from the crown of certain duties. [230]

In order, however, to properly comprehend the principle of law involved in the case at bar it must be constantly borne in mind that there is a marked distinction between a title acquired by prescription under the statute of limitations and a title acquired through the medium of the common-law presumption of a lost grant or conveyance. Confusion here is the more likely to occur because under the statute of limitations title also vests upon the presumption of a grant. (do Rego vs. Halama, 24 Haw. 750; Warvelle on Ejectment, sec. 418). But as pointed out in 2 C. J., Sec. 650, pp. 288, 289, under the statute of limitations the rule is an arbitrary one and the presumption is conclusive, whereas the common law presumption is rebuttable. In 1 Jones on Evidence by Horwitz, sec. 77, it is said: "The party relying on his possession may of course call to his aid the statute of limitations where it is applicable and if he relies upon the statute the proofs must show compliance with its provisions. But the statute of limitations does not supersede the common-law presumption, and if this is relied upon possession for less than a period prescribed by the statute may with other cogent circumstances sustain the claim of conveyance or a lost grant. The length of time which brings a given case within the legal presumption of a grant or charter to validate a right long enjoyed is not defined but depends upon its peculiar circumstances. It may be necessary to seek the aid of this presumption in some cases where the statute of limitations

does not apply, as where it is urged against the State.”

Counsel for the Territory relies largely upon the decisions of this court in *Kahoomana vs. Minister of the Interior*, 3 Haw. 635, and *Thurston vs. Bishop*, 7 Haw. 421. But in these two cases as well as in *Minister of the Interior vs. Parke*, 4 Haw. [231] 366, and *Kunewa vs. Kaanaana*, 18 Haw. 252, this court was merely construing the principles involved in the application of the statute of limitations. In the *Kahoomana* case this court said: “The theory of title by prescription is, that the holding possession of an estate openly and adversely for a certain length of time creates an inference that there was a grant from the adverse claimant or his ancestors or grantors, and the statute of limitations forbids the adverse claimant from setting up against this long-continued possession the fact that there was no grant. But as against the Government a grant cannot be presumed or inferred from long possession in view of the law which required claimants to land to present their claims to the land commission for confirmation or rejection.” It is plainly to be seen that the court here was dealing with the law applicable to the statute of limitations and the common-law presumption of a lost grant was not involved in the case. The same might also be said of *Thurston vs. Bishop*, for it is recited in the opinion in that case, “It is admitted by the defense that no claim for this land on behalf of Lot Kamehameha was presented to the land commission according to law.” Of course the presumption of a lost grant could not

have been involved in the face of that admission.

One of the earliest American cases wherein the rule was adverted to and Kingston upon Hull vs. Horner, *supra*, was quoted with approval is Jackson vs. M'Call, 10 Johns. Rep. 376, delivered by the Supreme Court of New York in 1813. See also White vs. Loring, 24 Pick. 319, decided by the Supreme Court of Massachusetts in 1836. The principle was considered at length by the Supreme Court of Vermont in University of Vermont vs. Reynolds' Exr., 3 Vt. 542. We quote from that opinion: "A great variety of cases were read at the argument, and the elementary treatises are full of them, to show that a grant or the [232] extinguishment or surrender of a grant, and, in short, everything which will confirm a long-continued possession, may be presumed; and this not because it is necessary to believe that any such acts were actually done or executed but for the purpose of quieting possession. In cases of prescription this possession is conclusive as to the right. Certain facts being found to exist the right is confirmed as a matter of law and the possession is considered as conclusive of the right, as if a deed or charter was actually produced. There are certain other cases in which the presumption is not considered as altogether a legal inference but must be made by the jury, and yet the court advise or direct the jury to make such presumption. The enjoyment of certain incorporeal hereditaments for the period of twenty years, of adverse, establishes the right to such enjoyment founded on the presumption of a lost grant; but this possession is liable to

be explained. The enjoyment is therefore not an absolute title but may be rebutted. But if the enjoyment was adverse it affords sufficient ground for such presumption. Chancellor Kent says the later English authorities give to this presumption the most unshaken stability and they say it is conclusive evidence of right. Judge Story, in the case of *Tyler vs. Wilkinson*, considers it in this light and says that this presumption may go to the extinguishment of a right in various ways as well as by grant.

* * * Thus a grant of land may be presumed as well as a grant of a fishery or common or way, and many cases of this kind are to be found. * * *

From comparing these cases * * * it may be inferred that where there has been a long-continued possession which in its origin was or would have been unlawful unless there had been a grant; or if the origin of such possession cannot be accounted for without considering it either as unlawful or also lawful by virtue of a grant the court will [233] not infer that the possession was unlawful but direct the jury to presume such grant or anything which will confirm the possession. But if the original possession was consistent with the fact of there having been no grant, then although the possession may have been ever so long it will be left to a jury to say whether they believe such grant has been made and they must determine according to the weight of the evidence. * * * And where there has been a settlement and a possession for a long time, although no other grant or charter is produced under which such settlement and possession commenced, it may

and ought to be presumed that the charter under which no claim had been asserted had been abandoned or surrendered and either an antecedent or subsequent grant made to the inhabitants who are in the actual occupancy of their lands." The common-law presumption is one of policy as well as of convenience and necessary for the peace and security of society. (Fletcher vs. Fuller, 120 U. S. 534.) It will be sufficient ground for the presumption to show that by legal possibility a grant might have issued, and this appearing it may be assumed in the absence of circumstances repelling such conclusion that all that might lawfully have been done to perfect the legal title was in fact done and in the form prescribed by law." Williams vs. Donell, 2 Head, 695, quoted with approval in Fletcher vs. Fuller, *supra*. Here it may be mentioned that the presumption may be invoked in favor of the State as well as against it. Nelson vs. Fleming, 56 Ind. 310, 322.

The doctrine of the common-law presumption of a grant as against the sovereign was dealt with at length by the Supreme Court of the United States in United States vs. Chaves, 159 U. S. 452, and again in United States vs. Chaves, 175 U. S. 509. In the Chaves case the court said: "The principle upon which this doctrine rests is one of general jurisprudence and is recognized [234] in the Roman law and the codes founded thereon. * * * It is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et de*

jure whenever by possibility a right may be acquired in any manner known to the law. * * * Nothing, it is true, can be claimed by prescription which owes its origin to, and can only be had by, matter of record; but lapse of time, accompanied by acts done or other circumstances, may warrant the jury in presuming a grant or title by record. Thus also, though lapse of time does not of itself furnish a conclusive bar to the title of the sovereign, agreeably to the maxim *nullum tempus occurrit regi*, yet if the adverse claim could have had a legal commencement, juries are advised or instructed to presume such commencement after many years of uninterrupted possession or enjoyment. Accordingly royal grants have been thus found by the jury, after an indefinitely long-continued peaceful enjoyment accompanied by the usual acts of ownership." In the Chavez case two cases were covered in the one opinion, the same being cases Nos. 38 and 39. Referring to case No. 39 the court said: "The archives referred to and the documentary evidence are the same as in No. 38, except there is no grant." The opinion then proceeded to deal mainly with the principle involved in case No. 39. The land involved is situated in New Mexico and the petitioner claimed ownership through the medium of a lost Mexican grant issued long prior to the cession of the territory embracing New Mexico to the United States by Mexico by virtue of the treaty of Guadalupe Hidalgo in 1848. No original grant nor any record thereof could be produced. The opinion then proceeds: "Upon a long and uninterrupted possession the law bases presump-

tions as sufficient [235] for legal judgment in the absence of rebutting circumstances, as formal instruments or records of articulate testimony. Not that formal instruments or records are unnecessary, but it will be presumed that they once existed and have been lost. The inquiry then recurs, do such presumptions arise in this case and do they solve its questions? * * * We think there can be but one conclusion in this case. The possession of the land began in wrong or began in right. If in wrong it must be shown. The maxims of the law declare the other way. * * * Back to Clement Gutierrez, therefore, a continuous possession is established by admission and by testimony not contradicted. Back beyond the period of living memory and beyond that period the title needs no inquiry for its validity and repose." In *United States vs. Pendell*, 185 U. S. 189, the *Chaves* and the *Chavez* cases are cited with approval, the court further saying: "The evidence is sufficient not only to presume a grant but to presume any other matter which would have occurred in order to render the grant a perfectly valid one."

The principle involved was, therefore, recognized and applied in England as early as the time of Lord Coke. It has found ingraftment into the Roman civil law. It has had the repeated sanction of the Supreme Court of the United States as well as of the state courts and at no time has it been repudiated by the courts of Hawaii. Hence it must be considered the law of the land.

We have examined all of the assignments of error and find none of them sustained by the record. The decree below is affirmed.

JAMES L. COKE,
S. B. KEMP,
W. S. EDINGS.

J. LIGHTFOOT,
First Deputy Attorney General, for Plaintiff in
Error.

A. G. M. ROBERTSON,
(Robertson & Olson on the Brief) for Defendant in
Error.

[Endorsed]: No. 1212. Supreme Court, Territory of Hawaii. October Term 1919. In the Matter of the Petition of the Territory of Hawaii to Register and Confirm Its Title to the Ahupuaa of Kioloku in the District of Kau, Island and County of Hawaii, Territory of Hawaii. Opinion. Filed March 15, 1920, at 1:52 P. M. J. A. Thompson, Clerk. [236]

In the Supreme Court of the Territory of Hawaii.

No. 1212.

LAND COURT PETITION No. 283.

In the Matter of the Petition of the TERRITORY OF HAWAII to Register and Confirm Its Title to the AHUPUAA OF KIOLOKU in the District of Kau, Island and County of Hawaii, Territory of Hawaii.

Judgment.

The above-entitled cause having come on for hearing in this court upon a writ of error to the Land Court of the Territory of Hawaii, and this court having heard the parties and being fully informed in the premises, and having rendered its opinion on the 15th day of March, 1920;

THEREFORE, for the reasons stated in said opinion, it is ordered and adjudged that the decree of the Land Court of the Territory of Hawaii entered in said cause on the 4th day of February, 1919, dismissing the petition of the Territory of Hawaii, be, and the same is hereby affirmed.

Dated, Honolulu, T. H., March 18th, 1920.

[Seal]

BY THE COURT.

(Sgd.) J. A. THOMPSON,

Clerk.

O. K. as to form.

(Sgd.) J. LIGHTFOOT,

Acting Attorney General.

[Endorsed]: No. 1212. Supreme Court Territory of Hawaii. In the Matter of the Petition of the Territory of Hawaii to Register and Confirm Its Title to the Ahupuaa of Kioloku in the District of Kau, Island and County of Hawaii, Territory of Hawaii. Judgment. Filed March 18, 1920, at 2:50 P. M. J. A. Thompson, Clerk. [237]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

In the Matter of the Petition of the TERRITORY
OF HAWAII to Register and Confirm Its
Title to the AHUPUAA OF KIOLOKU, in
the District of Kau, Island and County of
Hawaii, Territory of Hawaii.

Petition for Allowance of Appeal.

To the Honorable the Chief Justice of the Supreme
Court of the Territory of Hawaii:

The Territory of Hawaii, appellant herein, deeming itself aggrieved by the decision and judgment of the Honorable Supreme Court of the Territory of Hawaii in said cause affirming the judgment of the Land Court of the Territory of Hawaii, which judgment of the Supreme Court of the Territory of Hawaii was entered and filed on the 18th day of March, 1920, comes now by Harry Irwin, Attorney General of the Territory of Hawaii, its attorney, and hereby petitions said Supreme Court of the Territory of Hawaii for an order allowing the Territory of Hawaii to prosecute an appeal and have the same allowed and issued from the United States Court of Appeals for the Ninth Circuit to the said Supreme Court of the Territory of Hawaii, under and according to the laws of the United States in that behalf made and provided, and that a transcript of the record, proceedings [238] and documentary exhibits upon which said judgment was made, duly authenticated, may be sent to

said United States Circuit Court of Appeals for the Ninth Circuit;

And in this behalf your petitioner, the said Territory of Hawaii, shows that the amount involved, exclusive of costs, exceeds the value of Five Thousand Dollars (\$5,000.00).

Dated at Honolulu, Territory of Hawaii, this 28th day of May, 1920.

THE TERRITORY OF HAWAII.

(Signed) HARRY IRWIN,

By HARRY IRWIN,

Attorney General of the Territory of Hawaii.

(Signed) J. LIGHTFOOT,

J. LIGHTFOOT,

First Deputy Attorney General, of Counsel.

Affidavit of Harry Irwin.

United States of America,
Territory of Hawaii,—ss.

Harry Irwin, being first duly sworn, on oath deposes and says: That he is the duly appointed, qualified and acting Attorney General of the Territory of Hawaii; that he has read the foregoing Petition and knows the contents thereof and that the matters and things therein set forth are true of his own knowledge; and further, that the amount involved in the cause aforesaid, exclusive of costs, exceeds the value of Five Thousand Dollars (\$5,000.00).

(Signed) HARRY IRWIN,

Attorney General of the Territory of Hawaii.

Subscribed and sworn to before me this 28th day of May, A. D. 1920.

[Notarial Seal]

(Signed) DOROTHY M. DUNNE,
Notary Public, First Judicial Circuit, Territory of
Hawaii. [239]

Due service of the above Petition for Allowance of Appeal and a receipt of a true copy thereof, this 29th day of May, 1920, is hereby admitted.

(Signed) ROBERTSON, CASTLE &
OLSON,
Attorneys for Hutchinson Sugar Plantation Com-
pany, Limited, Appellee. [240]

[Endorsed]: No. 1212. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Petition of the Territory of Hawaii to Register and Confirm Its Title to the Ahupuaa of Kioloku, in the District of Kau, Island and County of Hawaii, Territory of Hawaii. Petition for Allowance of Appeal. Filed June 1, 1920, at 2:30 P. M. J. A. Thompson, Clerk Supreme Court of Hawaii. [241]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

In the Matter of the Petition of the TERRITORY
OF HAWAII to Register and Confirm Its
Title to the AHUPUAA OF KIOLOKU, in
the District of Kau, Island and County of
Hawaii, Territory of Hawaii.

Assignment of Errors.

And now comes the Territory of Hawaii, appellant above named, by Harry Irwin, Attorney General of the Territory of Hawaii, and says that in the record and proceedings in the above-entitled cause, in the Supreme Court of the Territory of Hawaii, there is manifest error to the prejudice of the said appellant, in this, to wit:

First. The said Supreme Court of the Territory of Hawaii erred in rendering, entering and filing its decision affirming the decree of the Land Court of the Territory of Hawaii, which said decision of said Supreme Court of the Territory of Hawaii was filed in said cause on the 15th day of March, 1920, and which said decree of the said Land Court was entered and filed on the 4th day of February, 1919.

Second. The said Supreme Court of the Territory of Hawaii erred in rendering and filing judgment affirming the decree of the Land Court of the Territory of Hawaii, [242] which said judgment of said Supreme Court of the Territory of Hawaii was filed in said cause on the 18th day of March, 1920, and which said decree of said Land Court was entered and filed on the 4th day of February, 1919.

Third. The Supreme Court of the Territory of Hawaii erred in not reversing the decree of said Land Court of the Territory of Hawaii, which said decree was entered and filed in said Land Court on the 4th day of February, 1919.

Fourth. That the said Supreme Court of the Territory of Hawaii erred in not holding and in not

entering judgment in said cause in favor of said appellant and against the Hutchinson Sugar Plantation Company, Limited.

Fifth. That said Supreme Court of the Territory of Hawaii erred in holding and deciding that the doctrine of the common-law presumption of a lost grant may be invoked in favor of the state as well as against it.

Sixth. The said Supreme Court of the Territory of Hawaii erred in holding and deciding as follows:

“No living witness has been produced who was present at the proceedings before the Boundary Commissioner, and while the statement of Kalakaua in his petition was weighty evidence supporting the claim that no award of Kioloku had been issued to his mother, yet the proceedings had upon the petition before the Commissioner strongly refute that assumption.”

Seventh. The Supreme Court of the Territory of Hawaii erred in holding and deciding as follows:

“Clear probative force must be attached to the facts that both the king and the Government, although being represented at the hearing before the Boundary Commissioner, neither interposed any objection thereto, and the hearing proceeded to final determination.” [243]

Eighth. The Supreme Court of the Territory of Hawaii erred in holding and deciding as follows:

“The fact that Mr. Kanakanui’s search has revealed the existence of no record of an award

of Kioloku taken together with the recitation contained in the petition of Kalakaua constitutes the strongest circumstances in the case of the Territory. This evidence, weighty as it may seem, appears to be overcome by other facts forming a combination of circumstances which irresistibly lead to the conclusion that Kioloku had been awarded to Ana Keohokalole, namely, the facts that she was exercising dominion over this property as early as 1861; that in the partition deed of 1870 this land was set apart to Kalakaua and in 1873 the boundaries were settled upon his application with the knowledge and acquiescence of the king and the government; that from 1870 down to 1913, a period of forty-three years, the several successive governments of Hawaii recognized Kioloku as the property of Kalakaua and his successors in interest; that during this entire period no claim whatsoever was asserted by the government or by any representative thereof to Kioloku, and during the whole period the property was assessed as the property of Kalakaua and his successors in interest and taxes were collected by the government down to the date of the institution of this proceeding."

Ninth. The Supreme Court of the Territory of Hawaii erred in holding and deciding as follows:

"The evidence introduced on behalf of the company we deem to be sufficient to sustain the Judge of the Land Court in presuming that a

grant of Kioloku was issued to Ane Keohokalo, the grant itself having been lost or for other reasons cannot now be produced.”

Tenth. The Supreme Court of the Territory of Hawaii erred in holding and deciding that in the case of Kahoomana vs. Minister of the Interior, 3 Haw. 635,

“It is plainly to be seen that the Court here was dealing with the law applicable to the statute of limitations and the common law presumption of a lost grant was not involved in the case.” [244]

WHEREFORE, the Territory of Hawaii, appellant above named, prays that the judgment of said Supreme Court of the Territory of Hawaii be reversed and set aside and that said Supreme Court of the Territory of Hawaii be ordered to enter judgment for and in favor of the Territory of Hawaii, declaring that it, the said Territory of Hawaii is the sole owner in fee simple absolute of all the lands set forth in the petition for registration of its title to the land of Kioloku, filed in said Land Court, and that the said Hutchinson Sugar Plantation Company, Limited, has no right, title or interest whatsoever in said land.

Dated at Honolulu, Territory of Hawaii, this 29th day of May, 1920.

HARRY IRWIN,
Attorney General of the Territory of Hawaii.

J. LIGHTFOOT,
First Deputy Attorney General, of Counsel.

Due service of the above Assignment of Errors and receipt of a true copy thereof, this 29th day of May, 1920, is hereby admitted.

ROBERTSON, CASTLE & OLSON,
Attorneys for Hutchinson Sugar Plantation Company, Limited, Appellee. [245]

[Endorsed]: No. 1212. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Petition of the Territory of Hawaii to Register and Confirm Its Title to the Ahupuaa of Kioloku in the District of Kau, Island and County of Hawaii, Territory of Hawaii. Assignment of Errors. Filed June 1, 1920, at 2:30 P. M. J. A. Thompson, Clerk Supreme Court of Hawaii. [246]

In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of the Petition of the TERRITORY OF HAWAII to Register and Confirm Its Title to the AHUPUAA OF KIOLOKU, in the District of Kau, Island and County of Hawaii, Territory of Hawaii.

Order Allowing Appeal.

Upon reading and filing the foregoing petition for an order allowing appeal, together with an assignment presented therewith of errors alleged to have occurred in the Supreme Court of the Territory of Hawaii and in the proceedings in the trial of said cause prior thereto,

IT IS ORDERED that an appeal be and the same is hereby allowed to the Territory of Hawaii to have reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered in the above-entitled cause on the 18th day of March, 1920, and the proceedings in the trial of said cause prior thereto.

Dated at Honolulu, Territory of Hawaii, this 29th day of May, 1920.

[Seal]

JAMES L. COKE,

Chief Justice of the Supreme Court of the Territory of Hawaii.

Due service of the above order and receipt of a true copy thereof, this 29th day of May, 1920, is hereby admitted.

ROBERTSON, CASTLE & OLSON,

Attorneys for Hutchinson Sugar Plantation Company, Limited, Appellee. [247]

[Endorsed]: No. 1212. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Petition of the Territory of Hawaii to Register and Confirm Its Title to the Ahupuaa of Kioloku in the District of Kau, Island and County of Hawaii, Territory of Hawaii. Order Allowing Appeal. Filed June 1, 1920, at 2:30 P. M. J. A. Thompson, Clerk Supreme Court of Hawaii. [248]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

In the Matter of the Petition of the TERRITORY
OF HAWAII to Register and Confirm Its
Title to the AHUPUAA OF KIOLOKU, in
the District of Kau, Island and County of
Hawaii, Territory of Hawaii.

**Citation on Appeal Returnable to United States
Circuit Court of Appeals.**

The President of the United States to Hutchinson
Sugar Plantation Company, Limited, GREET-
ING:

You are hereby cited and admonished to be and
appear in the United States Circuit Court of Ap-
peals for the Ninth Circuit at San Francisco, State
of California, within thirty (30) days after the date
of this citation, pursuant to an appeal filed in the
clerk's office of the Supreme Court of the Territory
of Hawaii, wherein the Territory of Hawaii is ap-
pellant, and you, the Hutchinson Sugar Plantation
Company, Limited, are appellee, to show cause, if
any there be, why the judgment rendered against
said appellant as in said appeal mentioned, should
not be corrected, and why speedy justice should not
be done to the parties in that behalf. [249]

WITNESS the Honorable EDWARD DOUG-
LASS WHITE, Chief Justice of the Supreme

Court of the United States, this 29th day of May, 1920.

[Seal] JAMES L. COKE,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Due service of the above Citation on Appeal, and receipt of a true copy thereof, this 29th day of May, 1920, is hereby admitted.

ROBERTSON, CASTLE & OLSON,
Attorneys for Hutchinson Sugar Plantation Company, Limited, Appellee. [250]

[Endorsed]: No. 1212. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Petition of the Territory of Hawaii to Register and Confirm Its Title to the Ahupuaa of Kioloku in the District of Kau, Island and County of Hawaii, Territory of Hawaii. Citation on Appeal Returnable to United States Circuit Court of Appeals. Filed June 1, 1920, at 2:30 P. M. J. A. Thompson, Clerk Supreme Court of Hawaii. [251]

In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of the Petition of the TERRITORY OF HAWAII, to Register and Confirm Its Title to the AHUPUAA OF KIOLOKU, in the District of Kau, Island and County of Hawaii, Territory of Hawaii.

Order Permitting Cash Deposit in Lieu of Bond.

IT IS HEREBY ORDERED that the Territory of Hawaii, appellant above named, may deposit the sum of One Hundred Dollars (\$100.00) in lawful money of the United States with J. A. Thompson, Esquire, Clerk of the Supreme Court of the Territory of Hawaii, in lieu of bond as security for costs on said appeal.

Dated at Honolulu, Territory of Hawaii, this 29th day of May, 1920.

[Seal]' (Signed) JAMES L. COKE,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Approved:

(Signed) ROBERTSON, CASTLE & OL-
SON,

Attorneys for Appellee.

Due service of the above order and a receipt of a true copy thereof, this 29th day of May, 1920, is hereby admitted.

(Signed) ROBERTSON, CASTLE & OL-
SON,

Attorneys for Hutchinson Sugar Plantation Company, Limited, Appellee. [252]

[Endorsed]: No. 1212. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Petition of the Territory of Hawaii, to Register and Confirm Its Title to the Ahupuaa of Kioloku, in the District of Kau, Island and County of Hawaii, Territory of Hawaii.

Order Remitting Cash Deposit in Lieu of Bond.
Filed June 1, 1920, at 2:30 P. M. J. A. Thompson,
Clerk Supreme Court Hawaii. [253]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

In the Matter of the Petition of the TERRITORY
OF HAWAII, to Register and Confirm Its
Title to the AHUPUAA OF KIOLOKU, in
the District of Kau, Island and County of
Hawaii, Territory of Hawaii.

**Order Extending Time to and Including July 21,
1920, to Prepare and Transmit Record.**

Upon the application of counsel for appellant,
and just cause appearing therefor, and pursuant to
Section 1 of Rule 16 of the United States Circuit
Court of Appeals for the Ninth Circuit.

IT IS HEREBY ORDERED that the appellant
and the Clerk of this Court be, and they are hereby
allowed until and including the 21st day of July,
A. D. 1920, within which to prepare and transmit
to the Clerk of the Circuit Court of Appeals for the
Ninth Circuit, at San Francisco, California, the
record in the above-entitled cause on appeal, to-
gether with petition for appeal and assignment of
errors therewith and all other papers as part of
said record.

Dated, Honolulu, Territory of Hawaii, this 15th day of June, A. D. 1920.

[Seal]

JAMES L. COKE,

Chief Justice of the Supreme Court, Territory of Hawaii. [254]

[Endorsed]: No. 1212. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Petition of the Territory of Hawaii, to Register and Confirm Its Title to the Ahupuaa of Kioloku, in the District of Kau, Island and County of Hawaii, Territory of Hawaii. Order Extending Time for Preparation and Transmission of Record. Received and Filed in the Supreme Court of Hawaii, June 15, 1920, at 9:05 o'clock A. M. J. A. Thompson, Clerk Supreme Court of Hawaii. [255]

In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of the Petition of the TERRITORY OF HAWAII, to Register and Confirm Its Title to the AHUPUAA OF KIOLOKU, in the District of Kau, Island and County of Hawaii, Territory of Hawaii.

Order Extending Time to and Including September 21, 1920, to Prepare and Transmit Record.

Upon the application of counsel for appellant, and just cause appearing therefor, and pursuant to Section 1 of Rule 16 of the United States Circuit Court of Appeals for the Ninth Circuit.

IT IS HEREBY ORDERED, that the appellant and the clerk of this court be and they are hereby allowed until and including the 21st day of September, A. D. 1920, within which to prepare and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the Record in the above-entitled cause on appeal, together with petition for appeal and assignment of errors therewith and all other papers as part of said record.

Dated, Honolulu, Territory of Hawaii, this 13th day of July, A. D. 1920.

[Seal] JAMES L. COKE,
Chief Justice of the Supreme Court, Territory of
Hawaii. [256]

[Endorsed]: No. 1212. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Petition of the Territory of Hawaii, to Register and Confirm Its Title to the Ahupuaa of Kioloku, in the District of Kau, Island and County of Hawaii, Territory of Hawaii. Order Extending Time for Preparation and Transmission of Record. Received and Filed in the Supreme Court, July 13, 1920, at 2:15 o'clock P. M. J. A. Thompson, Clerk Supreme Court of Hawaii. [257]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

In the Matter of the Petition of the TERRITORY
OF HAWAII, to Register and Confirm Its
Title to the AHUPUAA OF KIOLOKU, in
the District of Kau, Island and County of
Hawaii, Territory of Hawaii.

**Order Extending Time to and Including October 21,
1920, to Prepare and Transmit Record.**

Upon the application of counsel for appellant,
and just cause appearing therefor, and pursuant to
Section 1 of Rule 16 of the United States Circuit
Court of Appeals for the Ninth Circuit.

IT IS HEREBY ORDERED, that the appellant
and the Clerk of this Court be and they are hereby
allowed until and including the 21st day of October,
1920, within which to prepare and transmit to the
Clerk of the Circuit Court of Appeals for the Ninth
Circuit, at San Francisco, California, the record in
the above-entitled cause on appeal, together with
petition for appeal and assignment of errors there-
with, and all other papers as part of said record.

Dated, Honolulu, T. H., this 9th day of September,
A. D. 1920.

[Seal]

W. L. EDINGS,

Associate Justice, Supreme Court of the Territory of
Hawaii. [258]

[Endorsed]: No. 1212. In the United States Cir-
cuit Court of Appeals for the Ninth Circuit. In
the Matter of the Petition of the Territory of

Hawaii, to Register and Confirm Its Title to the Ahupuaa of Kioloku, in the District of Kau, Island and County of Hawaii, Territory of Hawaii. Order Extending Time for Preparation and Transmission of Record. Filed September 9, 1920, at 9:45 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii. [259]

In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of the Petition of the TERRITORY OF HAWAII, to Register and Confirm Its Title to the AHUPUAA OF KIOLOKU, in the District of Kau, Island and County of Hawaii, Territory of Hawaii.

Amended Praecipe for Transcript of Record on Appeal Returnable to the United States Court of Appeals for the Ninth Circuit.

To J. A. THOMPSON, Esquire, Clerk of the Supreme Court for the Territory of Hawaii:

You will please prepare a transcript of the record in the above-entitled cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and include in said transcript the following papers on file in said cause, to wit:

(a) Application for Writ of Error, dated July 26, 1920.

(b) Notice of Application for Writ of Error, dated July 26, 1920.

- (c) Assignment of Errors, dated July 26, 1920.
- (d) Writ of Error, dated July 26, 1920. [260]
- (e) Petition for Registration of Title, being Petition No. 283, filed August 2, 1913.
- (f) Answer of Hutchinson Sugar Plantation Company, dated December 5, 1913.
- (g) Motion for Leave to Reopen Case for the Purpose of Offering further Evidence in the Petition of the Territory, dated December 12, 1918.
- (h) Stipulation as to Agreed Facts, dated December 27, 1918.
- (i) Decision, filed January 29, 1919.
- (j) Decree, filed February 4, 1919.
- (k) Clerk's Minutes of the Proceedings Had.
- (l) Registered Map referred to in Petition for Registration, filed August 2, 1913.
- (m) Petitioner's Exhibit "A," being certified copy of a portion of Registered Map No. 1409 on file in the office of the Survey Department of Hawaii, the same being entitled "Map of a portion of Kau, District of Hawaii, Scale 2000 feet, Compiled by J. F. Brown, Sept., 1895, principally from surveys by F. S. Lyman."
- (n) Petitioner's Exhibit "B," being certified copy of a portion of Registered Map No. 1455 on file in the office of the Survey Department of Hawaii, the same being entitled "Map of a Section of Kau, Hawaii, from Kiolakaa to Punaluu, Map and Survey by M. P. Monsarrat, 1887, Scale 1000 ft. 1 inch."
- (o) Petitioner's Exhibit "C," being certified copy of a portion of Registered Map No. 1807 on

file in the office of the Survey Department of Hawaii, the same being entitled "Map of a Portion of Kau, Hawaii, from Punaluu to Kalae from surveys by M. D. Monsarrat, J. S. Emerson and F. S. Lyman. Scale 1:24000. Map by F. S. Dodge, 1894."

(p) Petitioner's Exhibit "D," (for Identification) being certified copy of list of unassigned lands occupied by private parties without any title from the Government.

(q) Petitioner's Exhibit "E" (For Identification), being certified copy of list of lands omitted in the "Mahele" of 1848, Island of Hawaii, District of Hilo. [261]

(r) Petitioner's Exhibit "F," being certified copy of pages 9 and 10 of Mahele Book.

(s) Contestant's Exhibit 1, being copy of letter dated January 9, 1888, by W. D. Alexander, Surveyor-General to His Excellency L. A. Thurston, Minister of the Interior; attached are eight (8) typewritten sheets showing "Area of Unassigned Lands," "Area of Government Grants Within Unassigned Lands," "Unassigned Lands Surrendered to the Government by the Crown Commissioners," "Unassigned Lands in the Possession of the Government," and "Unassigned Lands Sold by the Government."

(t) Contestant's Exhibit 9, being tracing of Map of Kaunamano, Kioloku, etc.

(u) Contestant's Exhibit 10, being certified copy of portion of Registered Map No. 575, on file in the Survey Department of Hawaii, the same being entitled "Map of a portion of Kau District, Island

of Hawaii, showing Ahupuaas, Grants, and Unsold Government Lands, Compiled by (1879) F. S. Lyman, Hilo, August, '79."

(v) Contestant's Exhibit 11, being certified copy of Deed of Trust, A. Keohokalole and husband to Chas. R. Bishop, Trustee, dated June 14, 1860, in Book 13, pp. 58-61.

(w) Contestant's Exhibit 12, being certified copy of Deed of Partition, dated July 1, 1870, L. M. Kapaakea, et als., with Lydia K. Dominis, in Book 30, pp. 364-367.

(x) The transcript of the testimony taken.

(y) Decision of the Supreme Court of the Territory of Hawaii, dated March 15, 1920.

(z) Judgment of the Supreme Court of the Territory of Hawaii, dated March 18, 1920.

You will please annex to and transmit with the record the following:

(1) The original petition for order allowing appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

(2) The original Assignment of Errors on said appeal.

(3) The original Order Allowing Appeal. [262]

(4) The original Citation with acknowledgment of service.

(5) The original Order Permitting Cash Deposit in Lieu of Bond.

(6) Your Return of the Citation under the seal of the Supreme Court of the Territory of Hawaii; and

(7) Your certificate under seal, stating in de-

tail the cost of the record and by whom the same was paid.

Dated at Honolulu, Territory of Hawaii, this 14th day of September, A. D. 1920.

(Signed) HARRY IRWIN,

Attorney General of the Territory of Hawaii.

(Signed) LIGHTFOOT,

First Deputy Attorney General,

Of Counsel. [263]

Due service of the above Amended Praeipce for Transcript of Record and receipt of a true copy thereof, this — day of September, 1920, is hereby admitted.

Attorneys for Hutchinson Sugar Plantation Co.,
Ltd., Appellee.

I hereby certify that a copy of the foregoing Amended Praeipce for Transcript of Record was served on Messrs. Robertson, Castle & Olson, Attorneys for Hutchinson Sugar Plantation Company, Ltd., this 15th day of September, A. D. 1920.

MILDRED QUINN WHITE,

Clerk. Office of the Attorney General. [264]

[Endorsed]: No. 1212. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Petition of the Territory of Hawaii, to Register and Confirm Its Title to the Ahupuaa of Kioloku, in the District of Kau, Island and County of Hawaii, Territory of Hawaii.

Amended Praecipe. Filed September 15, 1920, at 3:55 P. M. J. A. Thompson, Clerk Supreme Court Hawaii. [265]

In the Supreme Court of the Territory of Hawaii.

In the Matter of the Petition of the TERRITORY OF HAWAII to Register and Confirm Its Title to the AHUPUAA OF KIOLOKU in the District of Kau, Island and County of Hawaii, Territory of Hawaii.

Order for the Transmission of Original Exhibits.

To JAMES A. THOMPSON, Esquire, Clerk of the Supreme Court of the Territory of Hawaii:

You are hereby authorized and directed in connection with the writ of error from the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled suit, to transmit as part of the record required by the praecipe of the plaintiff in error, the following exhibits and maps, upon its counsel undertaking to return them to the files of this Court, viz.:

(1) Registered Map referred to in Petition for Registration, filed August 2, 1913.

(2) Petitioner's Exhibit "A," being certified copy of a portion of Registered Map No. 1409 on file in the office of the Survey Department of Hawaii, the same being entitled "Map of a portion of Kau, District of Hawaii, Scale 2,000 feet, Compiled by J. F. Brown, Sept. 1895, principally from surveys by F. S. Lyman." [266]

(3) Petitioner's Exhibit "B," being certified copy of a portion of Registered Map No. 1455 on file in the office of the Survey Department of Hawaii, the same being entitled "Map of a Section of Kau, Hawaii, from Kiolakaa to Punaluu, Map and Survey by M. D. Monsarrat, 1887, Scale 1,000 ft. 1 inch."

(4) Petitioner's Exhibit "C," being certified copy of a portion of Registered Map No. 1807 on file in the office of the Survey Department of Hawaii, the same being entitled "Map of a portion of Kau, Hawaii, from Punaluu to Kalae from surveys by M. D. Monsarrat, J. S. Emerson and F. S. Lyman. Scale 1: 24000. Map by F. S. Dodge, 1894."

(5) Petitioner's Exhibit "D," (For Identification) being certified copy of list of unassigned lands occupied by private parties without any title from the Government.

(6) Petitioner's Exhibit "E" (For Identification), being certified copy of list of lands omitted in the Mahele of 1848, Island of Hawaii, District of Hilo.

(7) Petitioner's Exhibit "F," being certified copy of pages 9 and 10 of Mahele Book.

(8) Contestant's Exhibit 1, being a copy of letter dated January 9, 1888, by W. D. Alexander, Surveyor-General to His Excellency L. A. Thurston, Minister of the Interior; attached are eight (8) typewritten sheets showing "Area of Unassigned Lands," "Area of Government Grants within Unassigned Lands," "Unassigned Lands Sur-

rendered to the Government by the Crown Commissioners," "Unassigned Lands in the possession of the Government," and "Unassigned Lands sold by the Government."

(9) Contestant's Exhibit 9, being Tracing of Map of Kaunamano, Kioloku, etc.

(10) Contestant's Exhibit 10, being certified copy of portion of Registered Map No. 575, on file in the Survey Department of Hawaii, the same being entitled "Map of a Portion of Kau District, Island of Hawaii, showing Ahupuaas, Grants, and Unsold Government Lands, Compiled by (1879) F. S. Lyman, Hilo, Aug. '79."

(11) Contestant's Exhibit 11, being certified copy of Deed of Trust, A. Keohokalole and husband to Chas. R. Bishop, Trustee, dated June 14, 1860, in Book 13, pp. 58-61. [267]

(12) Contestant's Exhibit 12, being certified copy of Deed of Partition, dated July 1, 1870, L. M. Kapaaakea, et als. with Lydia K. Dominis, in Book 30, pp. 364-367.

Dated, Honolulu, T. H., this 16th day of September, A. D. 1920.

[Seal] SUPREME COURT, TERRITORY
OF HAWAII.

JAMES L. COKE,

Chief Justice of the Supreme Court of the Territory of Hawaii. [268]

[Endorsed]: No. 1212. In the Supreme Court of the Territory of Hawaii. In the Matter of the Petition of the Territory of Hawaii to Register and Confirm Its Title to the Ahupuaa of Kioloku in the

District of Kau, Island and County of Hawaii, Territory of Hawaii. Order for the Transmission of Original Exhibits. Filed September 16, 1920, at 8:30 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii. [269]

In the Supreme Court of the Territory of Hawaii.

In the Matter of the Petition of the TERRITORY OF HAWAII to Register and Confirm Its Title to the AHUPUAA OF KIOLOKU in the District of Kau, Island and County of Hawaii, Territory of Hawaii.

Undertaking to Return Original Exhibits.

To JAMES A. THOMPSON, Esquire, Clerk of the Supreme Court of the Territory of Hawaii:

We hereby undertake to return to the files of the Supreme Court of the Territory of Hawaii the following original exhibits and maps, sent to the United States Circuit Court of Appeals for the Ninth Circuit in accordance with the order of the Chief Justice of the Supreme Court of the Territory of Hawaii:

(1) Registered Map referred to in Petition for Registration, filed August 2, 1913.

(2) Petitioner's Exhibit "A," being certified copy of a portion of Registered Map No. 1409 on file in the office of the Survey Department of Hawaii, the same being entitled "Map of a Portion of Kau, District of Hawaii, Scale 2000 feet, Com-

piled by J. F. Brown, Sept. 1895, principally from surveys by F. S. Lyman."

(3) Petitioner's Exhibit "B," being certified copy of a portion of Registered Map No. 1455 on file in the office of the Survey Department of Hawaii, the same being entitled "Map of a Section of Kau, Hawaii, from Kiolakaa to Punaluu, Map and Survey by M. D. Monsarrat, 1887, Scale 1000 ft. 1 inch." [270]

(4) Petitioner's Exhibit "C," being certified copy of a portion of Registered Map No. 1807 on file in the office of the Survey Department of Hawaii, the same being entitled "Map of a Portion of Kau, Hawaii, from Punaluu to Kalae from surveys by M. D. Monsarrat, J. S. Emerson and F. S. Lyman. Scale 1: 24000. Map by F. S. Dodge 1894."

(5) Petitioner's Exhibit "D" (For Identification), being certified copy of purported list of unassigned lands occupied by private parties without any title from the Government.

(6) Petitioner's Exhibit "E" (For Identification), being certified copy of purported list of lands omitted in the "Mahele" of 1848, Island of Hawaii, District of Hilo.

(7) Petitioner's Exhibit "F," being certified copy of pages 9 and 10 of Mahele Book.

(8) Contestant's Exhibit 1, being copy of letter dated January 9, 1888, by W. D. Alexander, Surveyor-General to His Excellency L. A. Thurston, Minister of the Interior; attached are eight (8) typewritten sheets showing "Area of Un-

assigned Lands," "Area of Government Grants within Unassigned Lands," "Unassigned Lands Surrendered to the Government by the Crown Commissioners," "Unassigned Lands in the Possession of the Government," and "Unassigned Lands Sold by the Government."

(9) Contestant's Exhibit 9, being tracing of Map of Kaunamano, Kioloku, etc.

(10) Contestant's Exhibit 10, being certified copy of portion of Registered Map No. 575, on file in the Survey Department of Hawaii, the same being entitled "Map of a Portion of Kau District, Island of Hawaii, showing Ahupuaas, Grants, and Unsold Government Lands, Compiled by (1879), F. S. Lyman, Hilo, Aug. '79."

(11) Contestant's Exhibit 11, being certified copy of Deed of Trust, A. Keokahokalo and husband, to Chas. R. Bishop, Trustee, dated June 14, 1860, in Book 13, pp. 58-61. [271]

(12) Contestant's Exhibit 12, being certified copy of Deed of Partition, dated July 1, 1870, L. M. Kapaakea, et als. with Lydia K. Dominis, in Book 30, pp. 364-367.

Dated, Honolulu, T. H., September 16, 1920.

HARRY IRWIN,

Attorney-general of Hawaii.

J. LIGHTFOOT,

First Deputy Attorney-general. [272]

[Endorsed]: No. 1212. In the Supreme Court of the Territory of Hawaii. In the Matter of the Petition of the Territory of Hawaii to Register and Confirm Its Title to the Ahupuaa of Kioloku in the

District of Kau, Island of Hawaii, County of Hawaii, Territory of Hawaii. Undertaking to Return Original Exhibits. Filed September 16, 1920, at 11:55 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii. [273]

In the Supreme Court of the Territory of Hawaii.

In the Matter of the Petition of the TERRITORY OF HAWAII to Register and Confirm Its Title to the AHUPUAA OF KIOLOKU in the District of Kau, Island and County of Hawaii, Territory of Hawaii.

Certificate of Clerk to the Transcript of Record.

Territory of Hawaii,
City and County of Honolulu,—ss.

I, JAMES A. THOMPSON, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the petition for order allowing appeal, herein filed, a copy whereof is attached to the foregoing transcript of record, being pages 238 to 241, both inclusive, and in pursuance to the Amended Praecipe to me directed, a copy whereof is hereto attached, being pages 260 to 265, both inclusive, DO HEREBY TRANSMIT to the Honorable United States Circuit Court of Appeals for the Ninth Circuit the foregoing transcript of record, being pages 1 to 237, both inclusive, pages 252 to 253, both inclusive, and pages 270 to 273, both inclusive, AND DO HEREBY CERTIFY the same to be full, true and correct copies of the pleadings, record, proceed-

ings, transcript of testimony, exhibits, minutes, decisions and decrees which are on file and of record in the office of the Clerk of the Supreme Court of the Territory of Hawaii, in a cause entitled "In the Matter of the Petition of the Territory of Hawaii to Register and Confirm Its Title to the Ahupuaa of Kioloku, in the District of Kau, Island and County of Hawaii, Territory of Hawaii," Numbered 1212.

I DO FURTHER CERTIFY that the original Assignment of Errors, dated and filed June 1, 1920, and admission of service of copy thereof, being pages 242 to 246, both inclusive, the original Order Allowing Appeal, filed June 1, 1920, with acknowledgment of service of copy thereof, being pages 247 to 248, both inclusive, the original Citation on Appeal, filed June 1, 1920, with acknowledgment of service of copy thereof, being pages 249 to 251, both inclusive, the original order filed June 15, 1920, extending time to and including July 21, 1920, for the preparation and transmission of record, being pages 254 to 255, both inclusive, the original Order filed July 13, 1920, extending time to and including September 21, 1920, for the preparation and transmission of record, being pages 256 to 257, both inclusive, and the original Order filed September 9, 1920, extending time to and including October 21, 1920, for the preparation and transmission of record, being pages 258 to 259, both inclusive of the foregoing transcript of record are hereto attached and herewith returned;

I FURTHER CERTIFY that pursuant to an order for the transmission of original exhibits, herein filed, a copy whereof is hereto attached, being pages 266 to 269, both inclusive, I have included and do transmit herewith as part of the record in the foregoing entitled cause, the following original exhibits, viz.: [274]

(1) Registered Map referred to in the Petition for Registration, filed August 2, 1913;

(2) Petitioner's Exhibit "A," certified copy of a portion of Registered Map No. 1409 on file in the office of the Survey Department of Hawaii, the same being entitled "Map of a portion of Kau, District of Hawaii, Scale 2000 ft.=1 inch compiled by J. F. Brown, Sept. 1895, principally from surveys by J. S. Lyman";

(3) Petitioner's Exhibit "B," certified copy of a portion of Registered Map No. 1455 on file in the office of the Survey Department of Hawaii, the same being entitled "Map of a Section of Kau, Hawaii, from Kioloakaa to Punaluu, Map and survey by M. D. Monsarrat, 1887, Scale 1000 ft. 1 inch";

(4) Petitioner's Exhibit "C," certified copy of a portion of Registered Map No. 1807 on file in the office of the Survey Department of Hawaii, the same being entitled "Map of a portion of Kau, Hawaii, from Punaluu to Kalae from surveys by M. D. Monsarrat, J. S. Emerson and F. S. Lyman, Scale 1:24000 Map by F. S. Dodge 1894";

(5) Petitioner's Exhibit "D" (for Identification) being certified copy of list of unassigned lands

occupied by private parties without any title from the Government;

(6) Petitioner's Exhibit "E" (for Identification) being certified copy of list of lands omitted in the "Mahele" of 1848 Island of Hawaii, District of Hilo;

(7) Petitioner's Exhibit "F," certified copy of pages 9 and 10 of Mahele Book;

(8) Contestant's Exhibit 1, certified copy of Letter dated January 9, 1888, by W. D. Alexander, Surveyor General to His Ex. L. A. Thurston, Minister of the Interior, attached are eight (8) typewritten sheets showing "Area of Unassigned Lands," "Area of Government Grants within Unassigned Lands," "Unassigned Lands Surrendered to the Government by the Crown Commissioners," "Unassigned Lands in the possession of the Government," and "Unassigned Lands sold by the Government";

(9) Contestant's Exhibit 9, Tracing, Map of Kaunamano, Kioloku, etc.;

(10) Contestant's Exhibit 10, certified copy of portion of Registered Map No. 575 on file in the Survey Department of Hawaii, the same being entitled "Map of portion of Kau District, Island of Hawaii, showing Ahupuaas, Grants and Unsold Government Lands—Compiled by (1879) F. S. Lyman, Hilo, Aug. 79';

(11) Contestant's Exhibit 11, certified copy of Deed of Trust, A. Keohokalole and husband to Charles R. Bishop, Trustee, dated June 14, 1860, in book 13, pages 58-61; and [275]

(12) Contestant's Exhibit 12, certified copy of Deed of Partition, dated July 1, 1870, L. M. Kapa-akea et als., with Lydia K. Dominis, in book 30, pages 364-367.

I also certify that the cost of the foregoing transcript of record is \$68.25, and that said amount has been paid by the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 28th day of September, A. D. 1920.

[Seal]

JAMES A. THOMPSON,
Clerk Supreme Court, Territory of Hawaii. [276]

[Endorsed]: No. 3588. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Petition of the Territory of Hawaii to Register and Confirm Its Title to the Ahupuaa of Kioloku, in the District of Kau, Island and County of Hawaii, Territory of Hawaii, The Territory of Hawaii, Appellant, vs. Hutchinson Sugar Plantation Company, Limited, Appellee. Transcript of Record. Upon Appeal from the Supreme Court of the Territory of Hawaii.

Filed October 14, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

WAIOHINU

KAUNAMANO

KAALAIKI

TERRITORY OF HAWAII
LAND COURT

You and Description with Petition No. 286
Territory of Hawaii, Petitioner.
Land of Kaula, District of Kau, Island of Hawaii

- Beginning at a "W" on rock on a small knoll in fern,
the true azimuth and distance to "Kula" Trig. Station being 17° 30'
281° 00' and from this station the true azimuth and distance to
Government Survey Trig. Station "Napua" is 15° 23' 6439.0 feet,
and running by true azimuths -
1. 15° 10' 2712.0 feet along the land of Kaunamano;
 2. 146° 23' 1967.0 feet along the land of Kaunamano;
 3. 141° 23' 1934.0 feet along the land of Kaunamano;
 4. 139° 43' 2065.0 feet along the land of Kaunamano;
 5. 138° 53' 79.0 feet to a place called Napuaia;
 6. 210° 00' 1868.0 feet along the land of Kaulaiki;
 7. 338° 20' 2317.0 feet along the land of Kaulaiki;
 8. Thence along the middle of a stream along the land of Kaulaiki,
360° 10' 2785.0 feet;
 9. Thence still along the middle of the stream along the land of
Kaulaiki, the direct azimuth and distance
being 278° 00' 1282.0 feet; from this
point the true azimuth and distance to a
Forest Reserve Monument is 219° 00' 33.0
feet;
 10. 328° 00' 2370.0 feet along the land of Honuapo to a "W" marked
in bed rock at gully at a place called
Kumahu, about 15 feet north of a water
hole;
 11. 332° 20' 275.0 feet along the land of Honuapo to a "W" on 3rd
stone in fern;
 12. 315° 00' 1924.0 feet along the land of Honuapo to a "W" on 3rd
stone;
 13. 310° 30' 1744.0 feet along the land of Honuapo to a "W" on
large 3rd stone at a place called
Kauyapo; from this point the true azimuth and
distance to Government Survey Trig. Sta-
tion "Kumahu" is 218° 18' 4963.0 feet;
 14. 299° 25' 1484.0 feet along the land of Honuapo;
 15. 311° 05' 624.0 feet along the land of Honuapo;
 16. 285° 30' 1304.0 feet along the land of Honuapo to a "W" on
3rd stone by 3rd stone; from this point the
true azimuth and distance to
Trig. Station is 289° 20' 450.0 feet and distance to
Government Survey Trig. Station "Kumahu"
is 184° 30' 3324.0 feet;
 17. 297° 23' 3807.0 feet along the land of Honuapo;
 18. 297° 38' 1226.0 feet along the land of Honuapo;
 19. 298° 08' 1275.0 feet along the land of Honuapo;
 20. 3° 05' 348.0 feet along L.C.A. 9659 to Kaulaiki;
 21. 304° 30' 728.0 feet along L.C.A. 9659 to Kaulaiki;
 22. 205° 35' 429.0 feet along L.C.A. 9659 to a pipe;
 23. 271° 00' 2660.0 feet along the land of Honuapo to a "W" cul
"Honuapo";
 24. 271° 00' 127.0 feet along the land of Honuapo to Honuapo
Point, at the "W";
 25. Thence along the sea coast, the direct azimuth and distance
being 43° 45' 1870.0 feet;
 26. 108° 05' 133.0 feet up Puna bluff along Grant 2836 to
Kaulaiki to a "W" on 3rd stone in fern;
 27. 108° 05' 348.0 feet along Grant 2836 to Kaulaiki;
 28. 108° 05' 1404.0 feet along Grant 2748 to Kaulaiki;
 29. 116° 50' 380.0 feet along L.C.A. 9660 to Kaulaiki and Lot 29
of the Kaunamano Homesteads;
 30. 113° 15' 331.0 feet along Lot 29 of the Kaunamano Homesteads;
 31. 108° 15' 1280.0 feet along Lot 27A of the Kaunamano Homesteads;
 32. 114° 38' 1255.0 feet along Lot 27A of the Kaunamano Homesteads;
 33. 118° 11' 2015.0 feet along Lots 27B, 28, and 29 of the Kaunamano
Homesteads;
 34. 121° 22' 2260.0 feet along Lots 20 and 19 of the Kaunamano
Homesteads;
 35. 125° 15' 3665.0 feet along Lot 16 of the Kaunamano Homesteads
and the land of Kaunamano to the point of
beginning.

AREA 836 ACRES

Compiled from survey and maps of
Geo. F. Wright, and from Govern-
ment Survey records, By
J. S. Overman,
Assistant Government Surveyor.

The above plan and description
has been duly examined by
me and found correct
Witness: Geo. T. Wright
J. H. Wright, Clerk
March 2 18
910
J. H. Wright, Clerk

To: 12-12-12
Filed: 12-12-12
Caul: 12-12-12, 12-12-12, 12-12-12
J. H. Wright, Clerk

SCALE: INCH = 1000 FEET

KAUNAMANO

HONUAPU







L.C.A. 9358, 9359, 9360, 9361, 9362, 9363, 9364, 9365, 9366, 9367, 9368, 9369, 9370, 9371, 9372, 9373, 9374, 9375, 9376, 9377, 9378, 9379, 9380, 9381, 9382, 9383, 9384, 9385, 9386, 9387, 9388, 9389, 9390, 9391, 9392, 9393, 9394, 9395, 9396, 9397, 9398, 9399, 9400, 9401, 9402, 9403, 9404, 9405, 9406, 9407, 9408, 9409, 9410, 9411, 9412, 9413, 9414, 9415, 9416, 9417, 9418, 9419, 9420, 9421, 9422, 9423, 9424, 9425, 9426, 9427, 9428, 9429, 9430, 9431, 9432, 9433, 9434, 9435, 9436, 9437, 9438, 9439, 9440, 9441, 9442, 9443, 9444, 9445, 9446, 9447, 9448, 9449, 9450, 9451, 9452, 9453, 9454, 9455, 9456, 9457, 9458, 9459, 9460, 9461, 9462, 9463, 9464, 9465, 9466, 9467, 9468, 9469, 9470, 9471, 9472, 9473, 9474, 9475, 9476, 9477, 9478, 9479, 9480, 9481, 9482, 9483, 9484, 9485, 9486, 9487, 9488, 9489, 9490, 9491, 9492, 9493, 9494, 9495, 9496, 9497, 9498, 9499, 9500, 9501, 9502, 9503, 9504, 9505, 9506, 9507, 9508, 9509, 9510, 9511, 9512, 9513, 9514, 9515, 9516, 9517, 9518, 9519, 9520, 9521, 9522, 9523, 9524, 9525, 9526, 9527, 9528, 9529, 9530, 9531, 9532, 9533, 9534, 9535, 9536, 9537, 9538, 9539, 9540, 9541, 9542, 9543, 9544, 9545, 9546, 9547, 9548, 9549, 9550, 9551, 9552, 9553, 9554, 9555, 9556, 9557, 9558, 9559, 9560, 9561, 9562, 9563, 9564, 9565, 9566, 9567, 9568, 9569, 9570, 9571, 9572, 9573, 9574, 9575, 9576, 9577, 9578, 9579, 9580, 9581, 9582, 9583, 9584, 9585, 9586, 9587, 9588, 9589, 9590, 9591, 9592, 9593, 9594, 9595, 9596, 9597, 9598, 9599, 9600, 9601, 9602, 9603, 9604, 9605, 9606, 9607, 9608, 9609, 9610, 9611, 9612, 9613, 9614, 9615, 9616, 9617, 9618, 9619, 9620, 9621, 9622, 9623, 9624, 9625, 9626, 9627, 9628, 9629, 9630, 9631, 9632, 9633, 9634, 9635, 9636, 9637, 9638, 9639, 9640, 9641, 9642, 9643, 9644, 9645, 9646, 9647, 9648, 9649, 9650, 9651, 9652, 9653, 9654, 9655, 9656, 9657, 9658, 9659, 9660, 9661, 9662, 9663, 9664, 9665, 9666, 9667, 9668, 9669, 9670, 9671, 9672, 9673, 9674, 9675, 9676, 9677, 9678, 9679, 9680, 9681, 9682, 9683, 9684, 9685, 9686, 9687, 9688, 9689, 9690, 9691, 9692, 9693, 9694, 9695, 9696, 9697, 9698, 9699, 9700, 9701, 9702, 9703, 9704, 9705, 9706, 9707, 9708, 9709, 9710, 9711, 9712, 9713, 9714, 9715, 9716, 9717, 9718, 9719, 9720, 9721, 9722, 9723, 9724, 9725, 9726, 9727, 9728, 9729, 9730, 9731, 9732, 9733, 9734, 9735, 9736, 9737, 9738, 9739, 9740, 9741, 9742, 9743, 9744, 9745, 9746, 9747, 9748, 9749, 9750, 9751, 9752, 9753, 9754, 9755, 9756, 9757, 9758, 9759, 9760, 9761, 9762, 9763, 9764, 9765, 9766, 9767, 9768, 9769, 9770, 9771, 9772, 9773, 9774, 9775, 9776, 9777, 9778, 9779, 9780, 9781, 9782, 9783, 9784, 9785, 9786, 9787, 9788, 9789, 9790, 9791, 9792, 9793, 9794, 9795, 9796, 9797, 9798, 9799, 9800, 9801, 9802, 9803, 9804, 9805, 9806, 9807, 9808, 9809, 9810, 9811, 9812, 9813, 9814, 9815, 9816, 9817, 9818, 9819, 9820, 9821, 9822, 9823, 9824, 9825, 9826, 9827, 9828, 9829, 9830, 9831, 9832, 9833, 9834, 9835, 9836, 9837, 9838, 9839, 9840, 9841, 9842, 9843, 9844, 9845, 9846, 9847, 9848, 9849, 9850, 9851, 9852, 9853, 9854, 9855, 9856, 9857, 9858, 9859, 9860, 9861, 9862, 9863, 9864, 9865, 9866, 9867, 9868, 9869, 9870, 9871, 9872, 9873, 9874, 9875, 9876, 9877, 9878, 9879, 9880, 9881, 9882, 9883, 9884, 9885, 9886, 9887, 9888, 9889, 9890, 9891, 9892, 9893, 9894, 9895, 9896, 9897, 9898, 9899, 9900, 9901, 9902, 9903, 9904, 9905, 9906, 9907, 9908, 9909, 9910, 9911, 9912, 9913, 9914, 9915, 9916, 9917, 9918, 9919, 9920, 9921, 9922, 9923, 9924, 9925, 9926, 9927, 9928, 9929, 9930, 9931, 9932, 9933, 9934, 9935, 9936, 9937, 9938, 9939, 9940, 9941, 9942, 9943, 9944, 9945, 9946, 9947, 9948, 9949, 9950, 9951, 9952, 9953, 9954, 9955, 9956, 9957, 9958, 9959, 9960, 9961, 9962, 9963, 9964, 9965, 9966, 9967, 9968, 9969, 9970, 9971, 9972, 9973, 9974, 9975, 9976, 9977, 9978, 9979, 9980, 9981, 9982, 9983, 9984, 9985, 9986, 9987, 9988, 9989, 9990, 9991, 9992, 9993, 9994, 9995, 9996, 9997, 9998, 9999, 10000

Walter E. Hall
Surveyor, Territory of Hawaii

No. 1212
 Read^{ing} filed in the Supreme
 Court August 14, 1919
 at 2:00 P.M.

J. A. Thompson
Clerk

Note

- | | |
|---|---------------------|
|  | Government Land |
|  | Kuleenas |
|  | Grants |
|  | Crown Land |
|  | Kanohiki Land |
|  | Unassigned " |
| ----- | Boundaries Ahupuaas |
| ----- | " Grants & Kuleenas |
| | Flumes |
| ----- | Fences |
| ----- | Stone Walls |



Petitioner's Exhibit "D"

Archives of Hawaii. Office of the Librarian Honolulu.

October 22, 1918.

I, the undersigned Librarian of Public Archives hereby certify that the attached list of "Unassigned Land occupied by Private Parties without any title from the Government," is a true and correct copy of a document that figures in connection with papers relating to the decision of the Supreme Court, October Term, 1888, in a suit entitle Lorrin A. Thurston, Minister of the Interior vs. Charles R. Bishop et al., Trustees on file in the Public Archives.

[Seal]

R. C. LYDECKER,

Librarian of Public Archives.

L. C. P. No. 283. Marked for Identification, Oct. 26, 1918, for Petitioner. A. V. Hogan, Regr.

List of Unassigned Lands
Occupied by Private Parties

Without any Title From the Government.

Mrs. B. P. Bishop's Estate.

Hilo, Hawaii.

Haiku, 1 & 2	360 Acres.
Kaiaakea	160 Acres.
Kaluakailio	67 Acres.
Kaumana	About 2700 " forest.
Kaunihe 1 & 2.	146 "
Lepoloa	95 Acres.
Maulua Iki.	
Piha 1 & 2.	4250 Acres.
Waikaumalo	300 Acres.

Kau, Hawaii.

Mohokea 1 & 2.	2761.66 Acres.
Paauau	2974 "

Island of Molokai.

Kaunakakai. 5240 Acres.

Kona, Oahu.

Ili of Opu, Makiki, 491.6 Acres.

W. G. Irwin & Co.

Kioloku in Kau, Hawaii. 834 Acres.

Sold by D. Kalakaua in 1874 to Obed Spencer.

D. H. Hitchcock.

Kaieie in Hilo, Hawaii. 790 Acres.

Purchased from one Kalawaia.

Papaikou Sugar Co.

Kaapoko in Hilo, Hawaii. About 100 Acres.

Alleged title derived from one Kou.

Area 2087 Acres.

Add Makolelau on Molokai, Claimant uncertain.

L. C. P. No. 283. Marked for Identification, Oct. 26, 1918, for Petitioner. A. V. Hogan, Registrar.

No. 1212. Recd. and filed in the Supreme Court August 14, 1919, at 2:00 P. M. J. A. Thompson, Clerk.

[Endorsed]: Exhibit D. No. 3588, for Identification. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 14, 1920. F. D. Monekton, Clerk.

Petitioner's Exhibit "E."

Archives of Hawaii. Office of the Librarian Honolulu.

October 23, 1918.

I, the undersigned Librarian of Public Archives, hereby certify that the attached is a true and correct copy of a document endorsed. "Re, Unassigned Lands—L. 2602—Exhibit D—Thurston vs. Bishop May 1, 1888." (certain pages as noted excepted) on file in the Public Archives.

[Seal]

R. C. LYDECKER,
Librarian, Public Archives.

L. C. P. No. 283. Marked for Identification, Oct. 26, 1918, for Petitioner. A. V. Hogan, Registrar.

No. 1212. Rec'd and filed in the Supreme Court. August 14, 1919, at 2:00 P. M. J. A. Thompson, Clerk.

No. 3588. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 14, 1920. F. D. Monckton, Clerk.

List of Lands Omitted in the "Mahele" of 1848

Island of Hawaii

District of Hilo.

Alaeloa Government Lease 224.

Auliilii

Awawaiki

Haiku 1 & 2. Claimed for Estate of Mrs. B. P. Bishop. 360 Acres.

Hakalau 1, or Iki. Claimed by Crown. Occupied by Hakalau Plantation.

Halepuna.

Gov't Grant 2975, Sept. 20, 1864, for 8.75 Acres.

" " 2976 " " " " 10.75 "

" " 2977 " " " " 8.9 "

" " 2978 " " " " 10.6 "

" " 2979 " " " " 7.66 "

" " 2980 " " " " 15.66 "

Haliilau. Leased by Government to Kaupakuea Plantation.
Hokumahoe.

Honomainoa & Kaihuiki.

Kaakepa. Gov't. Grant 1357, Mar. 21, 1854, for 40 Acres.

“ “ 1542, Jan. 20 1855, “ 30.75 “

“ “ 2710, May 31, 1860, “ 63.1 “

Kaapoko. Occupied by Papaikou Plantation Co.

Kaiaakea. Claimed for Estate of Mrs. B. P. Bishop. Area
160 Acres.

Kaieie. Claimed by Hitchcock & Kamai. Area 790 Acres.

Kahoahuna 1 & 2.

Kaloaloa 1 & 2.

Kaluakailio. Claimed for Estate of Mrs. B. P. Bishop. Area
67 A.

Kapena.

Kauniho 1 & 2. Claimed for Estate of Mrs. B. P. Bishop. 146
Acres.

Koaloa.

Koomano.

Kukuikea.

Lepoloa. Claimed for Estate of Mrs. B. P. Bishop. Area 95
Acres.

Makahiupa. Gov't. Lease 224.

Manowaiopae. Claimed for Crown. Area 180 Acres.

Maulua 1. Claimed for Estate of Mrs. B. P. Bishop.

Piha 1 & 2. Claimed for Estate of Mrs. B. P. Bishop. 4250
Acres.

Puueo.

Gov't Grant 23, July 15, 1847, 162.4 Acres to B. Pitman.

“ “ 190, Dec. 24, 1849, 10 “ “ H. Brown.

“ “ 185, Dec. 21, 1849, 210.6 “ “ B. Pitman.

Sale by K. IV to T. Miller of 110.93 Acres in 1857.

Remainder leased by K. IV to Thos. Spencer in 1862, and
sold to him by Commissioners of Crown Lands Aug. 3,
1870.

See Session Laws of 1870, p. 56.

Waikaumalo. Claimed for Estate of Mrs. B. P. Bishop.

District of Hamakua.

Alaeakila.	Gov't Grant 1737, Apr. 24, 1855,	36 Acres.
Kamoku.	" " 592, Mar. 10, 1851,	1640 "
	" " 632, May 14, 1851,	1139 "
	" " 1276, Aug. 31, 1853,	50 "
	" " 1559, Jan. 20, 1855,	320 "
	" " 1727, Apr. 21, 1855,	100 "
	" " 3099, July 5, 1873,	1312 "
	" " 358, " 29, 1850,	640 "
	" " 7, Jan. 14, 1847,	2 "
Koloaha.	" " 943, Oct. 26, 1852,	166.5 "
	" " 2047, May 21, 1856,	41.5 "
	" " 2381, June 24, 1857,	50 "
	" " 3173, 1877,	12.5 "
	" " 3238, 1879,	12.7 "
Kulihai.	" " 1562, Jan. 20, 1855,	37.75 "
	" " 2375, June 24, 1857,	150 "
Mahakuolo.		
Manai & Mooiki.	Gov't Grant 2489, June 1, 1858,	99 Acres.
Namoku.	Gov't Grant 1155, July 11, 1853,	113 Acres.
	" " 1968, Feb. 25, 1856,	40 "
	" " 3138, Oct. 12, 1874,	66 "
Nienie.	" Lease 217, to J. P. Parker.	
	" Grant 949, Oct. 26, 1852,	359 Acres.
	" " 2160, Nov. 12, 1856,	159 "
	" " 2161, " " "	200 "
Niupuka.	" " 944, Oct. 26, 1852,	48 "
	" " 1763, May 28, 1855,	54 "
	" " 1564, Jan. 20, 1855,	48 "
	pai. partly in Hana.	
Paako.	" " 1558, Jan. 20, 1855,	50 "
	" " 1764, May 28, 1855,	48 "
	" " 1770, " " "	48 "
	" " 1966, Feb. 25, 1856,	48.0 "
Papaki.	" " 1561, Jan. 20, 1855,	98.5 "
	" " 2444, Dec. 12, 1857,	51 "
	" " 2501, June 1, 1858,	55.5 "

	Gov't Grant 2490, June 1, 1858	111 Acres.
	“ “ 2499, “ “ “	51. “
	“ “ 3058, July 7, 1868,	29.5 “
Papalapuka.		
Papalele.	“ “ 1769, May 28, 1855,	47.5 “
	“ “ 1880, Oct. 22, 1855,	60 “
Papuaa.	“ “ 1774, May 28, 1855,	72 “
Pahukū.	“ “ 2051, May 21, 1856,	30 “

District of North Kona.

Halekii.

District of North Kona, continued.

Kawanui 1.	Gov't Grant 987, Dec. 24, 1852,	76 Acres.
	“ “ 1465, Nov. 1, 1854,	40 “
	“ “ 1596, Jan. 20, 1855,	1.1 “
	“ “ 1597, “ “ “	49 “
	“ “ 1598, “ “ “	280.5 “
Puukala.	“ “ 2410, Aug. 12, 1857,	208 “
Waiaha 2.	Claimed by Crown.	

District of South Kona.

Kauleoli 1 & 2.

Olelomoana.	Covered by Grant 3396, Jan. 14, 1887.	1226 Acres.
Papa 2.	“ “ “ 3397, “ “ “	4224 “

District of Kohala.

Ahulua.

Kapaau.	Gov't Grant 1546, Jan. 20, 1855,	44.8 Acres.
	“ “ 1547, “ “ “	164.2 “
	“ “ 1548, “ “ “	15.85 “
	“ “ 2000, Apr. 2, 1856,	518.5 “
	“ “ 2055, May 21, 1856,	112 “
	“ “ 2105, Sept. 15, 1856,	70 “
	“ “ 2461, Feb. 19, 1857,	88 “

Koaie.

Koea.

Makiloa & Puukole.	Grant 2362, Apr. 8, 1857,	182 Acres.
Pahinahina.	“ 2334, Feb. 25, 1857,	155 “
“	Gov't Lease 92 to Kohala Ranch Co.	408 “

District of Kau.

Auhulili 1 & 2.
Halekaa.

District of Kau, continued.

Kaapahu.

Kailiula 1 & 2. Grant 2086, Jan. 23, 1860, 247.33 Acres.

Kamakamaka.

Kanaio. Grant 2808, Oct. 14, 1861. 165 Acres.

Kioloku. Area 834 Acres. Surveyed in 1874 for D. Kalakaua.

Kuilioloa.

Kukui 1 & 2.

Kumu 1—8.

Lolipali.

Mahaiula &

Manono.	Grant	819, July 19, 1852,	49.75 Acres.
	"	1531, Jan. 20, 1855,	91.5 "
	"	1532, " " "	46 "
	"	2658, Dec. 14, 1859,	228 "

Miananai.

Mohokea 1 & 2. Claimed for Estate of Mrs. B. P. Bishop.
2761.66 A.

Nalua.

Paauau 1 & 2.

Palauhulu

1 & 2.	Grant	2882, Sept. 19, 1862,	349 Acres.
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Palima 1 & 2.	"	2655, Dec. 14, 1859,	162.5 "
	"	2446, Dec. 12, 1857,	173.5 "
	"	2727, Sept. 3, 1860,	755.3 "

Paukunui.	"	2118, Nov. 12, 1856,	52.2 "
	"	2653, Dec. 14, 1859,	205.5 "

Paukuiki.

Pohakuloa.

Puumakaa.	Grant	2154, Nov. 12, 1856,	103.3 Acres.
	"	2757, May 1, 1861,	138.5 "
	"	2758, " " "	171 "
	"	2760 " " "	106.75 "
	"	2523, Aug. 3, 1858,	90.75 "

Puukoa. Grant 2536, Nov. 14, 1858, 127.66 Acres.

Waiomao.

District of Puna.

Hulunanai.

Iliililoa.

Kaunaloa. Grant 2165, Nov. 12, 1856, 96 Acres.

“ 2807, Oct. 14, 1861, 200 “

Ki, B.

Kahue.

Keekee.

Keonepoko 2. Area 4630 Acres.

Island of Lanai.

Kamoku. Occupied by Crown. Area 8291 Acres.

Kalulu. Area 5945 Acres. Declared to be Government land
by the Privy Council Jan. 31, 1853.

Grant 3029, Sept. 12, 1866, 236.68 Acres.

Paomai. Area 9079 Acres. Occupied by Crown.

Island of Molokai.

Keopuka nui. All sold, Grant 2228, Feb. 2, 1857, 2250 Acres.
Exchanged for $\frac{1}{2}$ of Puueo, Kau, Hawaii, with
Mrs. B. P. Bishop.

Puaahaunui in Koolau.

Hakaanu “ “

Papalaua “ “

Kikipua “ “

Nihoa “ “ Grant 2681, Dec. 14, 1859, 9 Acres.

“ 2682, “ “ “ 19 “

Wailau in Koolau. Grant 1715, Apr. 20, 1855, 3.7 Acres.

“ 1718, “ “ “ 0.21 “

“ 1723, “ “ “ 32 “

Molokai, continued.

Wailau, continued. Grant 1924, Dec. 28, 1855, 6.00 Acres.

“ 1925, “ “ “ 0.14 “

“ 1989, Apr. 2, 1856, 0.54 “

“ 2111, Nov. 12, 1856, 5.77 “

Grant 2612, Sept. 9, 1859, 41.2 Acres.

“ 2617, “ “ “ 9.09 “

“ 2618, “ “ “ 1.1 “

Punalau 1 & 2.

Kaunakakai. Claimed for Estate of Mrs. B. P. Bishop. Area
5240 Acres.

Kapaakea. Claimed for Estate of Crown. Area 2178 Acres.

Makole.

Makolelau. Area 2087 Acres.

Island of Oahu.

Ili of Opu in Pawaa, Waikiki. Area 491.6 Acres. Claimed by
Estate of Mrs. B. P. Bishop.

Ahupuaa of Keaau, Waianae, Area 2431 Acres. Claimed by
the Crown.

Except Pages A, B, C, D, E, F, G, H, I, and J ;

Referring to Leases.

Estimated

Area of Unassigned Lands.

Island of Hawaii.

District of Hilo	11700 Acres.
“ “ Hamakua	10364 “
“ “ Kohala	3219 “
“ “ Kona	8872 “
“ “ Kau	17179 “
“ “ Puna	11801 “
<hr/>	
Total for Hawaii	63135 “
Island of Lanai	23315 “
“ “ Molokai	17225 “
“ “ Oahu	491.6 “

Total Area of Unassigned Lands	104166.6 “
--------------------------------	------------

16225

3440.6

106,115.6

Area of Government Grants.

within Unassigned Lands.

District of Hilo	579.11 Acres.
“ “ Hamakua	7823.75 “
“ “ Kohala	1350.35 “
“ “ North Kona Estimated	619.00 “
“ “ South Kona “	5500.00 “
“ “ Kau	3262.25 “
“ “ Puna	296.00 “
<hr/>	
Total for Hawaii.	19430.46 “
Island of Lanai	236.68 “
“ “ Molokai	2376.96 “
<hr/>	

Total Area of Grants in Unassigned Lands. .22044.1 “

Note.

As the unassigned lands are intermixed with Government Lands, and as their boundaries in many cases are undetermined, the above figures are not exact, but may be regarded as a close approximation to the facts.

Detailed Estimates of
Areas of Unassigned Lands.

Island of Hawaii.

District of Hilo.

Haiku	Surveyed.	360 Acres.
Kaaiaakea	“	160 “
Kaluakailio	“	67 “
Kauniho	“	146 “
Lepoloa	“	95 “
Manowaiopae	“	180 “
Kaumano	“	2700 “
Piha	“	4250 “
Puueo	“	2800 “
Hakalau 1	“	614 “
Kaieie	“	790 “

Henomainoa &				
Kaihuiki	Surveyed		245	Acres.
Waikaumalo	"		300	"
			<hr/>	
Total Surveyed			10007	"
Auliilii	Unsurveyed			
Awawaiki	"			
Kaihoahuna &	"			
Kaloaloa 1 & 2	"	estimated	500	Acres.
Halepuna. All Sold.			65	"
Hokumahoe		"	230	"
Kaakepa A. & B.		"	314	"
Kaapoko		"	100	"
Kukuikea		"	22	"
Alaeloa,				
Haliilau,				
Kapena, Maulua Iki,				
Koaloa, Koomano, Makahiupa, &		"	462	"
			<hr/>	
Total for Hilo			11700	"

Island of Hawaii.

District of Hamakua.

Alaeakila	estimated from map	150	Acres.
Kamoku	" about	1500	"
Koloaha	" from map	380	"
Kulihai	" " "	280	"
Mahakuolo. All Sold.		441	"
Manai &			
Mooiki A	Surveyed	175	"
Namoku	"	287	"
Nienie & Papuaa	estimated from map	484	"
Niupuka	" " "	54	"
Paako & Papalapuka	" " "	280	"
Pahukii, very small		<hr/>	
Papaki	" " "	333	"

Papalele estimated from map 6000 Acres.

Total for Hamakua 10364 "

District of Kohala.

Ahulua	estimated	375 Acres.
Kapaau.	All sold.	306 "
Koaie	estimated	320 "
Koea	"	350 "
Makiloa	"	1005 "
Pahinahina	from surveys	563 "
Pumkole	estimated	300 "

Total for Kohala 3219 "

District of North Kona.

Kawanui 1.	Estimated from map	585 Acres.
Puukala	" " "	807 "
Waiaha 2.	" " "	230 "
Total for North Kona		1622 "

District of South Kona.

Kauleoli 1 & 2.	Estimated from map	460 "
Olelomoana 1.	" " Grant	1276 "
" 2.	Estimated	1290 "
Papa 2.	Grant	4224 "

Total for South Kona. 7250 "

District of Kau.

Auhulili 1 & 2	Estimated about	1000 Acres.
Halekaa	"	120 "
Kaapahu	"	600 "
Kailiula	"	1000 "
Kamakamaka	"	500 "
Kanaio	"	500 "
Kioloku	Surveyed	834 "
Kukui 1 & 2	Estimated	150 "
Kuilioloa	"	500 "

Kumu 1—8.	Estimated	1000	Acres.
Lolipali	“	120	“
Mahaiula	“	100	“
Manono	“	450	“
Miananai	“	100	“
Mohokea	Surveyed	2761	“
Nalua	Estimated	100	“
Paauau	Surveyed	2974	“
Palauhulu. All Sold.		349	“
		<hr/>	“
	over	13158	“

District of Kau, continued.

Brought forward		13158	Acres.
Palima. All sold.		1263	“
Pauku 1 & 2. “ “		258	“
Pohakuloa	Estimated	500	“
Puukoa	“	500	“
Puumakaa	“	1500	“
		<hr/>	“
Total for Kau.		17179	“

District of Puna.

Hulunanai	Surveyed	361	Acres.
Iliililoa	Estimated	300	“
Kanane	“	1200	“
Ki B.	“	500	“
Keekee	“	1500	“
Kahue	Surveyed	3310	“
Keonepoko 2.	“	4630	“
		<hr/>	“
Total for Puna		11801	“

Island of Lanai.

Paomai	By Survey	9079	Acres.
Kamoku	“ “	8291	“
Kalulu	“ “	5945	“
		<hr/>	
Total for Lanai		23315	“

Island of Oahu.

Ili of Opu in Makiki	By Survey	491.6	Acres.
Ahupuaa of Keaau in Waianae		2431	"
" " Kuliouou Iki, Kona.		518	"
		<hr/>	
		3440.6	"

Island of Molokai.

Keopuka Nui	Surveyed	2250	"
Kaunakakai	"	5240	"
Kapaakea	"	2148	"
Makolelau	"	2087	"
Makole	Estimated	1000	"
Puaahaunui,	"		
Hakaanu,	"		
Papalaua, &	"		
Kikipua,	" 4 small lands	500	"
Nihoa	"	1000	"
Punalau 1 & 2.	"	1000	"
Wailau	"	2000	"
		<hr/>	
Total for Molokai		17225	"

[Endorsed]: Re Unassigned Lands. L. 2602, Exhibit D, Thurston vs. Bishop, May 1, 1888, H. S. List of Unassigned Lands. This copy was substituted on May 24, 1888, for the written one then on file, by permission of Mr. Justice Dole. (S) J. H. Reist, Second Deputy Clerk.

Petitioner's Exhibit "F."

KO KAMEHAMEHA III.

	Na Aina.	Ahupuaa.	Kalana.	Mokupuni.
	Onouli	"	Kona	Molokai
	Kuhua	"	Lahaina	Maui
	Keokea	"	Kula	"
2	Kealahou 1, 2,	"	"	"
	Waiakoa	"	"	"
1	Kamehame 2,	"	"	"
5	Omaopio, 6, 7, 8, 9, 10,	"	"	"
1	Aapueo 3,	"	"	"
2	Kahilo 1, 2,	"	"	"
	Keahua	"	"	"
1	Kukuiaeo 3,	"	"	"
2	Kauau, 1, 2,	"	"	"
	Ahupau	"	"	"
	Hokuula	"	"	"
	Puulani, Holi ia no ke kakau hewa, mamua o ke kau ana o na inoa. S. P. Kalama.			
	Kouli	"	"	"
	Puulani	"	Kaupo	"
	Kaawaloa Awa, a me kahi)			
	honua i kai)	Kona	Hawaii	
	Kealakekua ke awa a me)			
	kahi honua i kai)	"	"	
	Keekee	Ahupuaa.	"	"
2	Kanaeue, 1, 2,	"	"	"
2	Paukea, 1, 2,	"	Kohala	"
	Na Aina.	Ahupuaa.	Kohala	Hawaii
	Kaauhuhu	"	"	"
	Aamakao	"	"	"
	Honomu	"	Hilo	"
	Apua	"	Puna	"
	Makaka	"	Kau	"
	Wailau	"	"	"

Kaalaiki	“	“	“
Kiolakaa	“	Kau	Hawaii
Papaikou	“	“	“
Nukakaia	“	“	“
Mohoae	“	“	“
Wailua Ili ma Hana			Maui
Waiomao	Ili ma	Waikiki	Oahu
Hamama	“	“	“
Makua	Ahupuaa	Waianae	“

Ke ae aku nei au i keia mahele, ua maikai. No ka Moi na aina i kakau maluna ma ka aoao 9, 11 o keia Buke, aohe o'u keleana maloko.

KEOHOKALOLE

Hale Alii,

Januari 28, 1848.

I hereby certify the foregoing to be a true and correct copy of the Division of Lands between Kamehameha III and Keohokalole as recorded in Mahele Book M. H. 1848, page 9, on file in the office of the Commissioner of Public Lands.

[Seal]

C. T. BAILEY,

Commissioner of Public Lands.

Land Office, Honolulu, August 14, 1919.

L. C. P. No. 283. Received for Identification Oct. 26, 1918, and Marked Petitioner's Exhibit F. A. V. Hogan, Registrar.

8/24/20.

Ko Keohokalole.

	Na Aina.	Ahupuaa.	Kalana.	Mokupuni.
	Paeohi	"	Lahaina	Maui
2	Kaheo, 1, 2,	"	Kula	"
3	Alae, 1, 2, 3,	"	"	"
2	Kealahou, 3, 4,	"	"	"
1	Kamehame, 1,	"	"	"
5	Omaopio, 1, 2, 3, 4, 5,	"	"	"
2	Aapueo, 1, 2,	"	"	"
	Makehu	"	"	"

Pakalani 1, 2, Holoia ia, no ke komo papalua mamua o ke kau ana i na inoa.

S. P. Kalama.

2	Kailua, 1, 2,	"	"	"
2	Pukalani, 1, 2,	"	"	"
	Alaakua	"	Hana	"
	Kukuiula	"	Kipahulu	"
	Muolea	"	Hana	"
	Hamoo	"	"	"
	Kealakekua	"	Kona	Hawaii
	Kaawaloa	"	"	"
	Onouli	"	"	"
	Ilikahi	"	"	"
	Kanakau	"	"	"
	Keahuolu	"	"	"
	Kaipuhaa	"	Kohala	"
	Hanaula	"	"	"
	Paauhau	"	Hamakua	"
	Keahakea	"	"	"
	Honohina	"	Puna	"
	Puua	"	"	"
	Kaioula	"	Kau	"
2	Makaakupa, 1, 2,	"	"	"
	Keaiwa	"	Kau	Hawaii
	Kaauhuhuula	"	"	"
	Pohina	"	"	"
	Puhalanui	"	"	"

	Na Aina.	Ahupuaa.	Kalana.	Mokupuni.
	Wiliwilinui	"	"	"
2	Papohaku	"	"	"
	Kawela	"	"	"
	Pau Ili		Kohala	"
	Hamohamo	"	Waikiki	Oahu
	Kahana	"	Koolauloa	"

Ke as aku nei au i keia mahele, ua maikai. No Keohokalole na aina i kakau ia maluna ma ka aoao 10, 12, o keia Buke; ua ae ia ku e hiki ke lawe aku imua o ka Poe Hoona Kuleana.

KAMEHAMEHA.

Hale Alii,

Januari 28, 1848.

I hereby certify the foregoing to be a true and correct copy of the Division of Lands between Keohokalole and Kamehameha III, as recorded in Mahele Book M. H. 1848, page 10, on file in the office of the Commissioner of Public Lands.

[Seal]

C. T. BAILEY,

Commissioner of Public Lands.

Land Office, Honolulu, August 14, 1919.

L. C. P. No. 283. Received for identification Oct. 26, 1918, and Marked Petitioner's Exhibit F. A. V. Hogan, Registrar.

8/24/20.

No. 1212. Recd. and filed in the Supreme Court at 2:00 P. M., August, 14, 1919. J. A. Thompson, Clerk.

[Endorsed]: #1444, L. C. P. 283, Petitioner's Exhibit F.

No. 3588. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 14, 1920. F. D. Monckton, Clerk.

Respondent's Exhibit No. 1.

Archives of Hawaii. Office of the Librarian Honolulu.

October 17th, 1918.

I, the undersigned Librarian of Public Archives hereby certify that the attached letter dated January 9th, 1888, addressed to the Minister of the Interior, and signed W. D. Alexander, Surveyor-General, and its four enclosures are true and correct copies of the originals, on file in the Public Archives.

[Seal]

R. C. LYDECKER,

Librarian, Public Archives.

Hawaiian Gov. Survey.

Honolulu, H. I. January 9, 1888.

Stamp received Jan. 22, 1889.

Answered_____

By_____

His Ex. L. A. Thurston,
Minister of the Interior.

Sir:

In regard to the subject of the unassigned lands, referred to me, I beg leave to report briefly as follows:

As was stated in my report of March 31, 1886, "this question is increasing in importance, and calls for settlement. There are 104 lands of this class, 88 on Hawaii, 12 on Molokai, two on Lanai and two on Oahu."

The question does not seem to turn on statute law as much as on fundamental principles, and takes us back to the first organization of constitutional government on these islands.

I shall endeavor to make a brief statement of the

case, not as a lawyer, but as a layman and a student of history.

It is admitted by all that under the ancient feudal system, the *allodium* of all land belonged to the King, not, however, as an individual, but "as the head of the nation or in his corporate right," to quote the language of the Land Commission.

The Constitution of 1840 declares that the land of the Kingdom was not the private property of Kamehameha I. "It belonged to the chiefs and people in common, of whom Kamehameha I, was the head, and had the management of the landed property."

Thus all lands forfeited for non-payment of taxes reverted to him. His consent was necessary for any transfers of real estate in the Kingdom, and also for real mortgages, and for the seizure of land for debt. (See Old Laws, p. 179.) When the labor tax first began to be regulated by law, every tenant was required to work one day in every week (Tuesday) for the King, and one day (Friday) for the landlord. But this tax was afterwards reduced to 36 days in the year for the King, and an equal number for the landlords. (Old Laws p. 27.) At the same time, it is doubtless true that Kamehameha III, would not have ventured at any time to dispossess one of those high chiefs whose titles to land dated from the Conquest, and who were consulted on all important affairs of state.

The ideas of a Nation and of a Government as distinguished from the person of the Sovereign were

formerly not understood, and first began to be clearly recognized in the Constitution of 1840.

From that time it was seen more and more clearly that the King held a twofold character, first as an individual chief and landholder, and secondly in his official capacity as head of the Government.

It was in this dual character that the Land Commission decided that one third of the lands in the Kingdom belonged to the King. It is hardly necessary in this report to repeat the history of the Land Commission and of the great Division of "Mahele" of 1848.

"It was evident," to quote from the decision of the Supreme Court, "In the matter of the Estate of His Majesty, Kamehameha IV," that the lands held by the King at the close of the "Mahele" were not regarded as his private property, strictly speaking. Even before his division with the landlords, a second division between himself and the Government was clearly contemplated, and he appears to have admitted that the lands he then held might have been subjected to a commutation in favor of the Government in like manner with the lands of the chiefs." And on the very day after the "Mahele" or division with his chiefs had closed, viz., the 8th of March, 1848, he proceeded "to set apart for the use of the Government the larger part of his royal domain, reserving to himself what he deemed a reasonable amount of land as his own estate." This latter class of lands "he reserved for himself and his heirs forever," as his own private estate, and they are now known as Crown Lands, the word "heirs" having

been declared by the Supreme Court to mean "successors to the throne." (Haw. Rep. Vol. II, p. 725.)

On the 7th of the following June, 1848, the Legislative Council passed the "Act relating to the lands of His Majesty, the King, and those of the Government," which merely confirms and ratifies what had already been done by the King, and designates the several Crown Lands and Government Lands by name.

As the whole work of the "Mahele" was pushed through to completion in 40 days, it resulted from undue haste and from imperfect information, that many lands, especially on Hawaii, were entirely overlooked.

The question is, to whom do they belong? As all *private* claims not brought before the Land Commission were declared to be *forever barred*, and as even the claims recorded in the Mahele Book, which were not presented before June 30, 1862, have reverted to the Government according to law, no title based on any such claim can be entertained. It was entirely in the power of the King and Legislative Council, representing the Nation, to prescribe the conditions on which alone allodial titles to land could be obtained.

The next question is, whether the lands in question belong to the class of Government lands, or to that of Crown lands, or to the lineal heirs of Kamehameha III.

As the Crown Lands, which descend to the successors of the Hawaiian Crown, are expressly limited and designated by name in the Act of June 7th, 1848,

I cannot find any legal authority for adding the unassigned lands to that list.

The decisions of the Supreme Court in the case of Kamehameha IV's Estate, cited above, and in the case of "Queen Emma vs. Commissioners of Crown Lands," tried in Jan. 1883, fully recognize the distinction between the Crown Lands Estate and the other private estate both real and personal of Kamehameha III. It was decided in the former case that "the descent of that part of his estate must be governed by the general law of inheritance"; and in the latter case that certain pieces of land, held under L. C. Award No. 10806, "not having been enumerated and made Crown Lands, * * * were not affected by statutes relating to Crown Lands."

Leaving, then, to one side the claim of the Commissioners of Crown Lands, the question lies between the Government and the heirs of Kamehameha III, represented by Mrs. Pauahi Bishop's Estate.

The question is whether the lands in dispute, overlooked by inadvertence in the great Division, shall be regarded as having belonged to the private estate of Kamehameha III, or to the Government as representing the Nation.

Several considerations tend to show that the parties who executed the original Mahele, Kamehameha III, and his Council, held the latter view. In the absence of any general declaration by the King and Council, we can infer their views from their action in special cases.

It is a significant fact that the King obtained an Award of the Land Commission No. 10806, for cer-

tain town lots, which had not been included in the Mahele.

As we have seen, those private claims, which were forfeited by neglect to present them before the Land Commission before Feb. 14th, 1848, *lapsed to the Government*, and not to the King.

In the same way the claims of Konohiki's, whose names were in the "Mahele Book," but who had failed to present their claims before the last day of June, 1862, were declared to have reverted *to the Government*.

Furthermore, town lots in default of heirs escheat to the Government. (Haw. Reports, Vol. III., p. 332.) What is more important is the fact that during the reign of Kamehameha III., the very lands in question were, as a class, treated as Government property, and that many sales from these lands were made by the Government, Royal Patents for which were signed by him.

About the only exception is the case of the land of Puueo, Hilo, which by some mistake was treated both as a Crown and a Government land.

It is certain that Kamehameha III and the able men who composed his Council, and who laid the foundation of the tenure of real estate now existing, understood their own work better than reactionaries of a later generation.

The powers delegated to the Land Commission were conferred by the Nation, King, Nobles and Commons, the latter being as yet but imperfectly represented. The titles finally patented emanated not from the King as an individual, but as repre-

sentative of the Government. It cannot be pretended that he alone gave the people their "*kuleanas*," for example, or that the *commutation* either in land or money was paid to him.

It was for the common benefit, to endow a National Government, that both the King and the Nobles voluntarily ceded part of their lands to the Government, and the Kuleanas were given by the chiefs as much as by the King.

It is true, indeed, that in such a period of transition, the true theory of the—^{peaceful}—revolution taking place was not clearly understood by the majority of those concerned in it, and that inconsistencies may be found in some of their acts.

But, in the view held by the master spirits of that peaceful revolution, the Government represents the Nation, including all the parties that divided the land, formerly held in common, and the Government is, therefore, so to speak, the residuary legatee.

At the same time, the Minister of the Interior is empowered by law to dispose of land in certain cases by quit-claim deeds, or otherwise, "by way of compromise or equitable settlements of the rights of claimants," and has exercised this right, notably in the case of the unassigned lands of Olelomoana and Papa 2, in South Kona, Hawaii.

The case of certain lands like Kaunakakai, Molokai, may be similar to the above, and if they are claimed for benevolent or charitable purposes, it is

probable that the Legislature would authorize the issuing of a Patent to the petitioner.

I submit herewith a list of the unassigned lands, together with the sales or leases of the same, and cases of adverse occupation are noted where they exist.

I have the honor to be,

Your ob't servant,

(Sgd.) W. D. ALEXANDER,
Surveyor-General.

Stamp:

Received

June 15, 1888

Answered ———

By ———

Area of Unassigned Lands.

Island of Hawaii.

District of		11700	Acres.
Hilo			
"	" Hamakua	10364	"
"	" Kohala	3219	"
"	" Kona	8872	"
"	" Kau	17179	"
"	" Puna	11801	"
		<hr/>	
Total for	Hawaii	63135	"

Island of Lanai	23315	Acres.
“ “ Molokai	17225	“
“ “ Oahu	491.6	“

Total Area of Unassigned Lands 104166.6 “
 Area of Government Grants
 Within Unassigned Lands.

District of Hilo	579.11	Acres.
“ “ Hamakua	7823.75	“
“ “ Kohala	1350.35	“
“ “ North Kona Estimated	619.00	“
“ “ South Kona “	5500.00	“
“ “ Kau	3262.25	“
“ “ Puna	296.00	“

Total Area of Grants in Hawaii	19430.46	“
“ “ “ “ “ Lanai	236.68	“
“ “ “ “ “ Molokai	2376.96	“

Total Area of Grants in Unassigned
 Lands 22044.1 “

R. C. L.

Unassigned Lands Surrendered to the Government
 by the Crown Commissioners.

Hawaii.

Hakalau-iki, Hilo,
 Manowaiopae, “
 Waiaha 2, Kona.

Lanai.

Paomai,
Kamoku,
Kalulu,

Molokai.

Kapaakea,

Oahu.

Kulionouiki, Kona,
Keaa, Waianae.

Maui.

Waiohuli, Kula.

R. C. L.

Unassigned Lands in the Possession of the Govern-
ment.

District of Hilo.

Alaeola.

Auliilii.

Awawaiki.

Haliilau.

Hokumahoe.

Honomainoa & Kaihuiki.

Kahoahuna 1 & 2.

Kapena.

Koaloa.

Kaumana.

Koomano.

Kukuikea.

Makahiupa.

District of Hamakua.

Mahakuolo.

Nienie.

Papalapuka.

Pahukii.

District of South Kona.

Kauleoli 1 & 2.

District of Kohala.

Ahulua.

Koaie.

Koea.

Pahinahina.

R. C. L.

District of Kau.

Ahulili 1 & 2.

Halekaa.

Kaapahu.

Kamakamaka.

Kuilioloa.

Kukui 1 & 2.

Kumu 1—8.

Lolipali.

Mahaiula.

Miananai.

Nalua.

Paukuiki.

Pohakuloa.

Waiomao.

District of Puna.

Hulunanai.

Iiililoa.

Ki, B.

Kahue.

Keekee.

Keonepoko, 2.

Island of Lanai.

Kalulu. Area 5945 Acres. Declared to be Government land by the Privy Council Jan. 31st, 1853.
Grant 3029, Sept. 12th, 1866, 236.68 Acres.

Island of Molokai.

Puaahaunui in Koolau.

Hakaanu “ “

Papalaua “ “

Kikipua “ “

Punalau 1 & 2.

Makole.

R. C. L.

Unassigned Lands Sold by the Government.

District of Hilo.

Halepuna.	Gov't Grant	2975, Sept. 20, 1864, for	8.75 Acres.
	“ “	2976, “ “ “ “	10.75 “
	“ “	2977, “ “ “ “	8.9 “
	“ “	2978, “ “ “ “	10.6 “
	“ “	2979, “ “ “ “	7.66 “
	“ “	2980, “ “ “ “	15.66 “
Kaakepa.	“ “	1357, Mar. 21, 1854, for	40 Acres.
	“ “	1542, Jan. 20, 1855, “	30.75 “
	“ “	2710, May 31, 1860, “	63.1 “
Puueo.	“ “	23, July 15, 1847, 162.4 Acres to B.	
		Pitman.	
	“ “	190, Dec. 24, 1849, 10 Acres to H.	
		Brown.	
	“ “	185, Dec. 21, 1849, 210.6 Acres to B.	
		Pitman.	

District of Hamakua.

Alaeakila.	Gov't. Grant	1737, Apr. 24, 1855,	36 Acres
Kamoku.	“ “	592, Mar. 10, 1851,	1640 “
	“ “	632, May 14, 1851,	1139 “
	“ “	1276, Aug. 31, 1853,	50 “
	“ “	1559, Jan. 20, 1855,	320 “

Hutchinson Sugar Plantation Co., Ltd. 331

	Gov't Grant	1727, Apr. 21, 1855,	100	Acres.
	"	" 3099, July 5, 1873,	1312	"
	"	" 358, " 29, 1850,	640	"
	"	" 7, Jan. 14, 1847,	2	"
Koloaha.	"	" 943, Oct. 26, 1852,	166.5	"
	"	" 2047, May 21, 1856,	41.5	"
	"	" 2381, June 24, 1857,	50	"
	"	" 3173, 1877,	12.5	"
	"	" 3238, 1879,	12.7	"
R. C. L.				
District of Hamakua.				
Kulihai,	Gov't Grant	1562, Jan. 20, 1855,	3775	Acres.
	"	" 2375, June 24, 1857,	150	"
Manai & Mooiki,	Gov't Grant	2489, June 1, 1858,	99	Acres.
Namoku,	Gov't Grant	1155, July 11, 1853,	113	Acres.
	"	" 1968, Feb. 25, 1856,	40	"
	"	" 3138, Oct. 12, 1874,	66	"
Nienie.	"	" 949, Oct. 26, 1852,	359	"
	"	" 2160, Nov. 12, 1856,	159	"
	"	" 2161, " " "	200	"
Nuipuka.	"	" 944, Oct. 26, 1852,	48	"
	"	" 1763, May 28, 1855,	54	"
	"	" 1564, Jan. 20, "	48	"
		partly in Hanapai.		
Paako.	"	" 1558, Jan. 20, 1855,	50	"
	"	" 1764, May 28, "	48	"
	"	" 1770, " 28, "	48	"
	"	" 1966, Feb. 25, 1856,	48	"
Papaki.	"	" 1561, Jan. 20, 1855,	98.5	"
	"	" 2444, Dec. 12, 1857,	51	"
	"	" 2501, June 1, 1858,	55.5	"
	"	" 2490, " 1, "	111.	"
	"	" 2499, " " "	51	"
	"	" 3058, July 7, 1868,	29.5	"
Papalele.	"	" 1769, May 28, 1855,	47.5	"
	"	" 1880, Oct. 22, 1855,	60.	"

District of Hamakua.				
Papuaa.	"	"	1774, May 28,	72. "
	"	"	2051, May 21, 1856,	30. "
District of North Kona.				
Kawanui 1.	Gov't Grant	987, Dec. 24, 1852,	16	Acres.
	"	"	1465, Nov. 1, 1854,	40 "
	"	"	1596, Jan. 20, 1855,	1.1 "
	"	"	1597, " " "	49. "
R. C. L.				
District of North Kona, continued.				
Kawanui.	Gov't Grant	1598, Jan. 20, 1855,	280.5	"
Puukala.	"	"	2410, Aug. 12, 1857,	208 "
District of South Kona.				
Olelomoana.	Covered by Grant	3396, Jan. 14, 1887,	1226	Acres.
Papa 2.	"	"	3397, " " "	4224 "
District of Kohala.				
Kapaau.	Gov't Grant	1546, Jan. 20, 1855,	44.8	Acres
	"	"	1547, " " "	164.2 "
	"	"	1548, " " "	15.85 "
	"	"	2000, Apr. 2, 1856,	518.5 "
	"	"	2055, May 21, 1856,	112. "
	"	"	2105, Sept. 15, "	70. "
	"	"	2461, Feb. 19, 1857,	88. "
Makiloa & Puukole.	Grant	2362, Apr. 8, 1857,	182	Acres.
Pahinahina.	"	"	2334, Feb. 25, 1857,	155 "
District of Kau.				
Kailiula 1 & 2.	Grant	2686, Jan. 23, 1860,	247.33	Acres.
Kanaio.	"	2808, Oct. 14, 1861,	165.	"
Manono.	"	819, July 19, 1852,	49.75	"
	"	1531, Jan. 20, 1855,	91.5	"
	"	1532, " " "	46.	"
	"	2658, Dec. 14, 1859,	228.	"
Palauhulu	Grant	2882, Sept. 19, 1862,	349.	Acres
1 & 2.	"	2655, Dec. 14, 1859,	162.5	"
Palima 1 & 2.	"	2446, " 12, 1857,	173.5	"
	"	2727, Sept. 3, 1860,	755.3	"
Paukunui.	"	2118, Nov. 12, 1856,	52.2	"
	"	2653, Dec. 14, 1859,	205.5	"
Puumakaa.	Grant	2154, Nov. 12, 1856,	103.3	Acres.
	"	2757, May 1, 1861,	138.5	"
R. C. L.				

District of Kau, continued.

Mumakaa.	Grant 2758, May 1, 1861,	171.	Acres.
	" 2760, " " "	106.75	"
	" 2523, Aug. 3, 1858,	90.75	"
aukkoa.	" 2536, Nov. 14, "	127.66	"

District of Puna.

aunaloa.	Grant 2161, Nov. 12, 1856,	96.	Acres.
	" 2807, Oct. 14, 1861,	200.	"

Island of Molokai.

eoopuka nui. All sold. Grant 2228, Feb. 2, 1857, 2250 Acres.
 exchanged for $\frac{1}{2}$ of Puueo, Kau, Hawaii, with Mrs. B. P.

Bishop.

ihoa in Koolau,	Grant 2681, Dec. 14, 1859,	9 Acres.
	" 2682, " " "	19 "
ailau in Koolau.	" 1715, Apr. 20, 1955,	3.7 "
	" 1718, " " "	0.21 "
	" 1723, " " "	32. "
	" 1924, Dec. 28, 1855,	6. "
	" 1925, " " "	0.14 "
	" 1989, Apr. 2, 1856,	0.54 "
	" 2111, Nov. 12, 1856,	5.77 "
	" 2612, Sept. 9, 1859,	41.2 "
	" 2617, " " "	9.09 "
C. L.	" 2618, " " "	1.1 "

L. C. P. No. 283. Received in evidence October 22, 1918, and marked Respondent's Exhibit #1. A. V. Logan,, Registrar.

No. 1212. Recd and filed in the Supreme Court August 14, 1919, at 2:00 P. M. J. A. Thompson, Clerk.

[Endorsed]: No. 3588. Contestant's Ex. "1." United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 14, 1920. F. D. Monckton, Clerk.

Walter B. Wall,
Surveyor, Territory of Hawaii.

Recd from *Arthur* Dec 2, 1918

710.1212
 Ford. and filed in the Supreme Court
 August 11th, 1914, at 2101 P.M.
 J. H. Thompson



Respondent's Exhibit No. 11.

DEED OF TRUST.

Stamped.

This Indenture, made this fourteenth day of June, A. D., one Thousand eight hundred & sixty, between K. Kapaakea & A. Keohokalole his wife, of Honolulu, Island of Oahu, Hawaiian Islands, of the first part, and Charles R. Bishop, his heirs & assigns of the same place, Trustee appointed for the purposes herein after mentioned of the second part, Witnesseth:

That whereas, the said parties of the first part or either one of them, are now justly indebted to sundry persons & are unable at present to pay the amounts of the same & deem it just & reasonable to secure & pay the amount of said indebtedness.

Now therefore this indenture witnesseth, that for the consideration & purposes herein contained & in consideration of one dollar to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, the said parties of the first part, doth by these presents, grant, bargain, sell, convey, assign & transfer & set over unto the said party of the second part & his heirs & assigns; all of their rights & interest in possession or in expectancy in & to all of their Real, Personal & Mixed estate including goods, wares, merchandise, furniture, horses, cattle, choses in Action & property & effects of every description to them or either of them or in which they or either of them have any rights or interest whatsoever on the Hawaiian

Islands or else where, wherever the same may be found, saving & excepting their personal wardrobe.

To have & to hold all & singular the premises hereby assigned or assured or intended to be assigned to the said part of the second part his heirs & assigns to his & their use & behoof forever.

But upon Trust, that the said party of the second part, his heirs and assigns shall with all reasonable speed out of the rents & profits or from the proceeds of the sale of the said property hereby assigned & transferred after deducting & retaining all such costs, charges & expenses & disbursements as shall be sustained or reasonably due in for or in relation to the execution of the trust hereof including the costs & charges & expenses of preparing & executing these presents, pay off & cancel all of the outstanding debts due & owing by the parties of the first part or either of them, together with the interest that may be due or become due on the same & for that purpose to sell & dispose of so much of the said property as may be necessary at Auction or otherwise upon such terms as may be deemed for the interest of the *part* of the second part, or to mortgage the same for the same purpose & after the payment of all of said outstanding debts & liabilities upon the further trust to manage & control what ever of the said property may remain unsold & not disposed for the uses and benefit of Keohokalole one of the parties of the first part, accounting for the use & profits thereof to her for & during her natural life and upon her decease to distribute

the entire remaining property share & share alike between her legal heirs.

And the said parties of the first part by these presents, doth name, constitute, & appoint the said party of the second part to be their Attorney irrevocable with full power of substitution in his name, or in the name of the said parties of the first part or otherwise howsoever, as the case may require but to & for the trusts herein declared, to demand, sue for, recover & receive the outstanding debts, interest, trust property & effects, to lease or mortgage the Real Estate until sold & the same to sell & convey, to receive the purchase money of the said Real Estate when sold & to institute, prosecute & defend all such processes & suits at law or in equity as may be necessary to fulfil the trust by this instrument created & to execute & perform, transact & deliver all such deeds, writing, acquittances acts matters & things as shall be necessary & expedient to carry into effect the trusts, uses, interests & purposes herein declared or contained as fully & effectually as the said parties of the first part could do personally if these presents had not been made. And the said parties of the first part doth hereby covenant with the said party of the second part, that the said parties of the first part will at all times promote & forward the speedy receipt & recovery of the debts, property & effects aforesaid & ratify & confirm all such acts as shall be lawfully done therein by virtue of these presents & will execute & perform all such other acts, deeds matters & things for the better & further assigning & assuring the

premises herein before assigned or otherwise assured & intended so to be, to the said party of the second part & for the interests & purposes herein declared as may be reasonably advised or requested. And it is hereby agreed by & between the parties hereto, that the said Trustee, may at his discretion, compound any debt or debts due or owing to the said parties of the first part & enter into & sign and execute any bargain or deed of composition, compromise or assignment of or with any person indebted to the said parties of the first part who shall become insolvent or unable to make punctual payments & also may make any such agreement or arrangement as shall be deemed reasonable with any person possessing any security given by the said parties of the first part upon any estate or other property of or holder by him or by any creditor of his by way of mortgage or pledge for money, or with any person having a lien on any such property by virtue of any attachment, levy, bailment or otherwise in order to procure such estate or property to be exonerated from the lien or charge created thereon & also may sell all or any part of the trust property necessary for the payment of outstanding debts for money *for money* to be paid on a future day or on credit, or for any security by way of Bill of Exchange or otherwise as the said Trustee shall think expedient & may compromise all matters which may be in dispute or submit the same to arbitration & may sell & convert into money any contingent interest & securities which cannot be immediately enforced with a prospect of advantage & all

debts which shall be deemed bad or doubtful or which cannot be collected in a reasonable time. And it is further agreed by & between all of the parties to these presents that the said Trustee named herein or his representatives, assigns or successors shall not be chargeable or accountable for any other property than what he or they shall actually receive by virtue of these presents, nor liable to make good any losses that shall happen in the management, sale or disposal of said Trust Estate without the wilful neglect or default of the said Trustee.

And the said party of the second part doth hereby covenant with the said parties of the first part that he will execute & perform the trusts hereby created to the best of his judgment & discretion it being expressly understood by all the parties hereto that the said party of the second part may assign & transfer the property conveyed to him by this instrument at any time that he may deem proper to such person as he may think competent to execute the trusts created thereby to be held by the person to whom he may so convey & transfer the same upon the same terms & in trust for the same purposes as are declared in this conveyance to him without being held accountable for the acts & doings of the person to whom he may make such conveyance & transfer.

In testimony whereof the said parties have set their hands & seals this fourteenth day of June,

A. D. One thousand eight hundred & sixty.

A. KEOHOKALOLE, [Seal]

K. KAPAAKEA, [Seal]

CHAS. R. BISHOP, [Seal]

Executed in presence of:

THOMAS BROWN.

Honolulu, Oahu,

June 14th, 1860,—ss.

Personally appeared before me this day A. Keohokalole & her husband K. Kapaakea and Chas. R. Bishop, parties to the foregoing instrument & severally acknowledged that they executed the same for the uses & purposes therein set forth. And the said A. Keohokalole on a private examination separate & apart from her husband declared that she executed the same of her own free will & accord & without fear or compulsion of her said husband.

Thomas Brown, Registrar of Conveyances. Rec'd. & Comp'd. this 14th day of June, A. D. 1860 at 25 Minutes past 3 o'clock P. M. Thomas Brown, Registrar of Conveyances.

Office of the Registrar of Conveyances.

Honolulu, Hawaii, October 17, 1918.

The foregoing is a true copy of record, recorded in the Office of the Registrar of Conveyances of the Territory of Hawaii, in Book 13, Pages 58-61.

Attest: [Seal] P. H. BURNETTE,

Registrar of Conveyances for the Territory of
Hawaii.

[Endorsed]: L. C. P No. 283. Received in Evidence, Oct. 25, 1918, and Marked Resp. Exhibit 11. A. V. Hogan, Registrar.

Certified Copy Trust Deed. A. Keohokalole & Hsb. to Chas. R. Bishop, Tr. Dated June 14, 1860. Recorded in Book 13, Pages 58-61. Registry of Conveyances for the Territory of Hawaii at Honolulu.

Contestant's Ex. "11." No. 1212. Recd and Filed in the Supreme Court August 14, 1919, at 2:00 P. M. J. A. Thompson, Clerk.

No. 3588. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 14, 1920. F. D. Monckton, Clerk.

Respondent's Exhibit No. 12.

DEED OF PARTITION.

(Stamped.)

An Indenture of Four Parts made this first day of July, in the year one thousand eight hundred and seventy, between John O. Dominis and Lydia K. Dominis, his wife, of the first part, Likelike of the second part, David Kalakaua and Kapiolani his wife, of the third part and W. P. Keahoolewa by his Guardian R. Keelikolani, of the fourth part,

Whereas, Lydia K. Dominis, Likelike, David Kalakaua and W. P. Keahoolewa, Children of C. Kapaakea and Ane Keohokalole both deceased are the heirs at law of Ane Keohokalole deceased and entitled as such Heirs at Law as tenants in common in and to the following described Real Estate situate in the Hawaiian Islands, to wit:

“Keahuolu” situate in North Kona, Hawaii, “Kapaakea and Kapiwai” situate in Puna, “Puna” situate in Puna, Hawaii, “Pau” situate in Pololu, Hawaii “Paeohi” situate in Lahaina, Maui. “Kioloku” situate in Kau, Hawaii. “Puamana” situate in Lahina, Maui, and

Whereas the said parties have agreed to Partition the above described property of which they are now jointly seized in possession their demesne as of fee, of and in the said lands and premises hereinbefore mentioned part and parcel of the Estate of their mother Ane Keohokalole deceased which is now subject to distribution.

Now this Indenture witnesseth: That the said Lydia K. Dominis by and with the consent of her husband John O. Dominis, Likelike, David Kalakua and R. Keeliikolani, Guardian of W. P. Keahoolewa a minor and for and in his behalf do by these presents make a full perfect and absolute partition of the said lands and premises aforesaid to and amongst them the said Lydia K. Dominis, Likelike, David Kalakua and W. P. Keahoolewa in four parts to be divided in manner and form following, that is to say, that the said Lydia K. Dominis and her heirs and assigns shall have and enjoy to the only use and behoof of her the said Lydia K. Dominis her heirs and assigns, all that certain tract, piece and parcel of land situate in the District of North Kona, Island of Hawaii and known and called “Keahuolu” with the appurtenances for the full part purparty and portion of the said Lydia K. Dominis of in and to all and every the premises

hereinbefore mentioned held by the said Lydia K. Dominis, Likelike, David Kalakaua and W. P. Keahoolewa as heirs at Law of Ane Keohokalole deceased.

And that the said Likelike her heirs and assigns shall have and enjoy to the only use and behoof of her the said Likelike her heirs and assigns, All those certain tracts pieces and parcels of land situate in Oahu and known and called "Kapaakea and Kapiwai" with the appurtenances for the full part purparty and portion of the said Likelike of in and to all and every the premises hereinbefore mentioned held by the said Likelike, Lydia K. Dominis, David Kalakaua and W. P. Keahoolewa as heirs at Law of Ane Keohokalole deceased.

And that the said W. P. Keahoolewa his heirs and assigns shall have and enjoy to the only use and behoof of him the said W. P. Keahoolewa his heirs and assigns all those certain tracts, pieces and parcels of land situate in the District of Puna, Island of Hawaii, and known and called "Puna" and also the land called "Pau" in Pololu, Island of Hawaii, and also the land called "Paeohi" in Lahaina, Island of Maui, with the appurtenances for the full part, purparty and portion of the said W. P. Keahoolewa of in and to all and every the premises hereinbefore mentioned held by the said W. P. Keahoolewa, Lydia K. Dominis, Likelike, and David Kalakaua as heirs at Law of Ane Keohokalole deceased.

And that the said David Kalakaua his heirs and assigns shall have and enjoy to the only use and

benefit of him the said David Kalakaua his heirs and assigns, All those certain tracts and parcels of land situate lying and being in the District of Kau, Island of Hawaii and known and called "Kioloku" and also "Puamana" situate in Lahaina, Island of Maui, with the appurtenances for the full part, purparty and portion of the said David Kalakaua of in and to all and every the premises hereinbefore mentioned held by the said David Kalakaua, Lydia K. Dominis, Likelike and W. P. Keahoolewa as heirs at Law of Ane Keohokalole deceased.

And the said Likelike, David Kalakaua and R. Keeliikolani, Guardian of W. P. Keahoolewa do by these presents give, grant, assign, release and confirm to the said Lydia K. Dominis and her heirs the said land and premises called "Keahuolu" aforesaid and all the estate, right, title and interest which the said Likelike, David Kalakaua and W. P. Keahoolewa have or either of them have or may or ought to have, of in or to the said lands and premises or any part or parcel thereof.

To have and to hold to the said Lydia K. Dominis her heirs and assigns to the only use and behoof of the said Lydia K. Dominis, her heirs and assigns forever. And the said Lydia K. Dominis by and with the consent of her husband, John O. Dominis, David Kalakaua and R. Keeliikolani, Guardian of W. P. Keahoolewa do by these presents, give, grant, assign, release and confirm to the said Likelike and her heirs the said above described lands and premises called "Kapaakea" and "Kapiwai" situate as aforesaid and all the estate, right, title and interest

which the said Lydia K. Dominis, David Kalakaua and W. P. Keahoolewa have or either of them hath or may or ought to have of or in or to the said lands and premises known as "Kapaakea" and "Kapiwai" as aforesaid.

To have and to hold to the said Likelike her heirs and assigns to the only use and behoof of the said Likelike her heirs and assigns forever. And the said Lydia K. Dominis by and with the consent of her husband John O. Dominis, Likelike and Keelikolani Guardian of W. P. Keahoolewa do by these presents give, grant, assign release and confirm to the said David Kalakaua and his heirs the said above mentioned lands and premises known and called "Kioloku" and "Puamana" situate as aforesaid and all the estate, right, title and interest which the said Lydia K. Dominis, Likelike and W. P. Keahoolewa have or either of them hath or may or ought to have of in or to the said lands and premises known and called "Kioloku" and "Puamana" situate as aforesaid.

To have and to hold to the said David Kalakaua his heirs and assigns to the only use and behoof of the said David Kalakaua his heirs and assigns forever. And the said Lydia K. Dominis by and with the consent of her husband John O. Dominis, Likelike and David Kalakaua do by these presents, give, grant, assign, release and confirm to the said W. P. Keahoolewa and his heirs the said above named tracts of land called "Puua" situate in Puna and "Pau" situate in Pololu, Hawaii, and also "Paeohi" situate in Lahaina, Maui and all the estate, right,

title and interest which the said Lydia K. Dominis, Likelike and David Kalakaua have or either of them hath or may or ought to have of in or to the said lands and premises known and called "Puua," "Pau" and "Paeohi" situate as aforesaid.

To have and to hold to the said W. P. Keahoolewa his heirs and assigns to the only use and behoof of the said W. P. Keahoolewa his heirs and assigns forever. And the said Kapiolani, wife of David Kalakaua in consideration of the sum of one dollar to her paid the receipt whereof is hereby acknowledged doth hereby release unto the said Lydia K. Dominis, Likelike and W. P. Keahoolewa their and each of their heirs and assigns, all her right and title of Dower in the lands and premises this day given, granted, assigned, released and confirmed to them and each of them by these presents.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered in the presence of

JNO. O. DOMINIS. [Seal]

L. K. DOMINIS. [Seal]

L. M. KAPAAKEA. [Seal]

D. KALAKAUA. [Seal]

KAPIOLANI. [Seal]

R. KEELIKOLANI. [Seal]

Register Office, Oahu, ss. On this 5th day of July, A. D. 1870, personally appeared before me John O. Dominis and L. K. Dominis his wife, and L. M. Kapaakea parties to the foregoing instrument who

severally acknowledged that they had executed the same for the uses and purposes therein set forth.

THOMAS BROWN,
Registrar of Conveyances.

Register Office, Oahu,—ss. On this 6th day of July, A. D. 1870, personally appeared before me David Kalakaua who acknowledged that he had executed the foregoing instrument for the uses and purposes therein set forth.

THOMAS BROWN,
Registrar of Conveyances.

Register Office, Oahu,—ss. On this 7th day of July, A. D. 1870, personally appeared before me Kapiolani who acknowledged that she had executed the foregoing instrument for the uses and purposes therein set forth.

THOMAS BROWN,
Registrar of Conveyances.

Personally appeared before me this 24th day of August, A. D. 1870, R. Keelikolani who acknowledged that she had executed the foregoing instrument for the purposes therein set forth.

CHARLES FREDERICK HART,
Circuit Judge 3rd J. D.

Recorded & Compared this 1st day of September, A. D. 1870 at 11 o'clock A. M.

THOMAS BROWN,
Registrar of Conveyances.

Office of the Registrar of Conveyances.

Honolulu, Hawaii, October, 17, 1918.

The foregoing is a true copy of record, recorded in the Office of the Registrar of Conveyances of

the Territory of Hawaii, in Book 30, Pages 364-367.

Attest: [Seal] P. H. BURNETTE,
 Registrar of Conveyances for the Territory of
 Hawaii.

[Endorsed]: L. C. P. No. 283. Received in Evidence, Oct 25, 1918, and Marked Resp. Exhibit 12. A. V. Hogan, Registrar.

Certified Copy. Partn. Deed. L. M. Kapaakea et als. With Lydia K. Dominis. Dated July 1, 1870. Recorded in Book 30, Pages 364-367. Registry of Conveyances for the Territory of Hawaii at Honolulu.

Contestant's Ex. "12" No. 1212. Rec'd and filed in the Supreme Court. Aug. 14, 1919, at 2:00 P. M. J. A. Thompson, Clerk.

**United States Circuit Court of Appeals for
the Ninth Circuit**

In the Matter of the Petition of THE TERRITORY OF
HAWAII to Register and Confirm Its Title to the
AHUPUAA OF KIOLOKU, in the District of Kau,
Island and County of Hawaii, Territory of Hawaii.

THE TERRITORY OF HAWAII,

Appellant,

vs.

HUTCHINSON SUGAR PLANTATION COMPANY,
LIMITED,

Appellee.

BRIEF

On Behalf of Appellant

FILED

JAN 13 1921

**F. D. MONCKTON,
CLERK**

UPON APPEAL FROM THE SUPREME COURT OF
THE TERRITORY OF HAWAII

**United States Circuit Court of Appeals for
the Ninth Circuit**

In the Matter of the Petition of THE TERRITORY OF
HAWAII to Register and Confirm Its Title to the
AHUPUAA OF KIOLOKU, in the District of Kau,
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THE TERRITORY OF HAWAII,

Appellant,

vs.

HUTCHINSON SUGAR PLANTATION COMPANY,
LIMITED,

Appellee.

BRIEF
On Behalf of Appellant

UPON APPEAL FROM THE SUPREME COURT OF
THE TERRITORY OF HAWAII

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WORDS AND PHRASES

AHUPUAA

A large division of land generally running from mountain to sea.

BOUNDARY COMMISSIONER,

A commissioner established under the Act of 1862, whose duty it was to determine the boundaries of lands awarded by name only.

ILI,

A tract of land within an Ahupuaa. There were two kinds of Ili: an Ili-aina which belonged to the Ahupuaa, and an Ili-kupono, which did not necessarily belong to the konohiki of the Ahupuaa.

KALAKAUA, DAVID,

Son of C. Kapaakea and Ane Keohokalole. Became King in 1874; Died 1891.

KEOHOKALOLE, ANE,

A High Chiefess. Wife of Caesar Kapaakea, and mother of David Kalakaua.

KONOHIKI,

1. An agent or representative of another.
2. A chief to whom had been awarded an Ahupuaa or other division of land.

KULEANA,

A small piece of land.

LAND COMMISSION AWARD,

A judgment of the Commission to Quiet Titles to Land under the Act of December 10, 1845.

LLELE,

A piece of land appurtenant to the Ahupuaa.

MAHELE,

A division. The Great Mahele refers to the division of land between Kamehameha III. and the Chiefs in 1848. There was also a Mahele between Kamehameha III. and the Government in 1850.

MAHELE AWARD,

An award issued by the Minister of the Interior under the Konohikis Act of 1860 to those whose names appeared in the Mahele Book of 1848, but who had failed to receive an award of the Land Commission.

ROYAL PATENT (upon confirmation of Land Commission award).

A Government grant.

ROYAL PATENT (Grant),

This was issued upon a sale or exchange of Government land.

Statement of the Case

On October 1st, 1913, the Territory of Hawaii filed in the Land Court of the Territory its petition No. 283, for registration of its title to a piece of land situate in the District of Kau, Island of Hawaii, known as the Ahupuaa of Kioloku, containing an area of 850 acres. (Rec. 15 to 21). A map of the land so sought to be registered is attached to the petition. (Rec. 297). Evidence was subsequently aduced placing the value of the land at \$11,000. (Rec. 132.)

The Land Court of the Territory in which the petition was filed is a Court of Record established in the year 1903. The statutory provisions relating thereto being found in sections 3133 to 3242 inclusive of the Revised Laws of Hawaii of 1915, as amended by Acts 61, 62 and 152 of the Session Laws of 1915, and Act 48 of the Session Laws of 1919.

In its petition the Territory claimed the ownership of the land in question and the highways crossing the same in fee simple. The petition recites *inter alia* that the land has never been awarded, patented or granted to any person or persons, and is in the class of "unassigned lands," which are the property of the Government; that the Hutchinson Sugar Plantation Company, a corporation organized under the laws of the State of California, claims the ownership of

the land by mesne conveyance from David Kalakaua (afterwards King)), who claimed the land as an heir at law of Ane Keohokalole, his mother, deceased.

The procedure established by law for the reference of the title to an examiner and the entry of a general default against all persons not appearing, was complied with, and on December 5th, 1913, the Hutchinson Sugar Plantation Company filed its answer claiming title to the land in question and denying the Territory's claim. (Rec. 21, 22 and 23).

On October 22nd, 1918, the cause came on for hearing before Honorable J. T. DeBolt, Judge of the Land Court of the Territory of Hawaii, when evidence was adduced in support of the petition by the Territory (Rec. 75 to 92 and 183 to 243), and evidence was likewise adduced on behalf of the contestant. (Rec. 93 to 183).

In addition to the evidence offered, stipulations as to several facts were entered into between the petitioner and the contestant by their respective counsel, and approved and accepted by the Court. It was admitted by the petitioner that ever since 1870 Kalakaua and his assigns have been in open, notorious, exclusive and adverse possession of the land in question, using it for such purposes as it was adapted to, and paying taxes thereon; and that the Hutchinson Sugar Plantation Company succeeded to the rights of Kalakaua by several mesne conveyances, none of which, however, refer to any mahele, land commission

award or patent of the land in question (Rec 60, 61, 129.)

After the hearing of the case had been concluded, evidence of the petition of Kalakaua for a certificate of boundaries of the Auphuua of Kioloku was discovered, and on motion the petitioner was allowed to introduce this evidence. (Rec. 23 to 28.) The motion was granted and the evidence referred to adduced. Whereupon counsel stipulated as to agreed facts in connection with the newly discovered evidence, which stipulation was approved by the Court. (Rec. 28 to 31.)

At the hearing in the Land Court the petitioner offered evidence in support of its claim that the land in question is "unassigned land." That is, that the Government had never conveyed or granted it to anyone and it therefore remained the property of the Territory.

Evidence was offered by the contestant in support of its claim that considering the long-continued possession of the contestant, and other facts and circumstances connected with the case, the Court should presume a grant even though such grant cannot now be found.

There are therefore two vital questions in the case, viz.:

I. HAS THE GOVERNMENT BY ANY AWARD, PATENT OR GRANT DISPOSED OF ITS TITLE TO THE LAND? AND

II. WILL THE COURT BY REASON OF THE LONG-CONTINUED POSSESSION OF THE CON-

TESTANT, AND THE OTHER FACTS AND CIRCUMSTANCES SHOWN IN THE CASE, PRESUME AN AWARD, GRANT OR PATENT?

The evidence being concluded and after oral argument and filing of briefs, the Court on January 29th, 1919, filed a decision finding that the petitioner has no right, title or interest whatsoever in and to the land in question, and therefore has no right to have its title registered, and decree was ordered dismissing the petition (Rec. 32 to 57.) The decree was accordingly entered. (Rec. 57 to 58.) Whereupon the case was taken on error to the Supreme Court of the Territory; (Rec. 1 to 14) the Supreme Court sustaining the Court below; (Rec. 244 to 263) and judgment was entered in the Supreme Court affirming the decree of the Land Court. To reverse this judgment the present appeal is taken.

SPECIFICATIONS OF ERRORS RELIED UPON

Attached to the petition for the allowance of appeal to this Court there is an assignment of errors, all of which are relied upon by the appellant in this case. These assignments are as follows:

“First. The said Supreme Court of the Territory of Hawaii erred in rendering, entering and filing its decision affirming the decree of the Land Court of the Territory of Hawaii, which said decision of said Supreme Court of the Territory of Hawaii was filed

in said cause on the 15th day of March, 1920, and which said decree of the said Land Court was entered and filed on the 4th day of February, 1919.

Second. The said Supreme Court of the Territory of Hawaii erred in rendering and filing judgment affirming the decree of the Land Court of the Territory of Hawaii (242), which said judgment of said Supreme Court of the Territory of Hawaii was filed in said cause on the 18th day of March, 1920, and which said decree of said Land Court was entered and filed on the 4th day of February, 1919.

Third. The Supreme Court of the Territory of Hawaii erred in not reversing the decree of said Land Court of the Territory of Hawaii, which said decree was entered and filed in said Land Court on the 4th day of February, 1919.

Fourth. That the said Supreme Court of the Territory of Hawaii erred in not holding and in not entering judgment in said cause in favor of said appellant and against the Hutchinson Sugar Plantation Company, Limited.

Fifth. That said Supreme Court of the Territory of Hawaii erred in holding and deciding that the doctrine of the common-law presumption of a lost grant may be invoked in favor of the state as well as against it.

Sixth. The said Supreme Court of the Terri-

tory of Hawaii erred in holding and deciding as follows:

'No living witness has been produced who was present at the proceedings before the Boundary Commissioner, and while the statement of Kalakaua in his petition was weighty evidence supporting the claim that no award of Kioloku had been issued to his mother, yet the proceedings had upon the petition before the Commissioner strongly refute that assumption.'

Seventh. The Supreme Court of the Territory of Hawaii erred in holding and deciding as follows:

'Clear probative force must be attached to the facts that both the king and the Government, although being represented at the hearing before the Boundary Commissioner, neither interposed any objection thereto, and the hearing proceeded to final determination.'
(243.)

Eighth. The Supreme Court of the Territory of Hawaii erred in holding and deciding as follows:

'The fact that Mr. Kakanui's search has revealed the existence of no record of an award of Kioloku, taken together with the recitation contained in the petition of Kalakaua, constitutes the strongest circumstances in the case of the Territory. This evidence, weighty

as it may seem, appears to be overcome by other facts forming a combination of circumstances which irresistibly lead to the conclusion that Kioloku had been awarded to Ane Keohokalole, namely, the facts that she was exercising dominion over this property as early as 1861; that in the partition deed of 1870 this land was set apart to Kalakaua and in 1873 the boundaries were settled upon his application with the knowledge and acquiescence of the king and the government; that from 1870 down to 1913, a period of forty-three years, the several successive governments of Hawaii recognized Kioloku as the property of Kalakaua and his successors in interest; that during this entire period no claim whatsoever was asserted by the government or by any representative thereof to Kioloku, and during the whole period the property was assessed as the property of Kalakaua and his successors in interest, and taxes were collected by the government down to the date of the institution of this proceeding.'

Ninth. The Supreme Court of the Territory of Hawaii erred in holding and deciding as follows:

'The evidence introduced on behalf of the company we deem to be sufficient to sustain

the Judge of the Land Court in presuming that a grant of Kioloku was issued to Ane Keohokalo, the grant itself having been lost or for other reasons cannot now be produced.'

Tenth. The Supreme Court of the Territory of Hawaii erred in holding and deciding that in the case of Kahoomana vs. Minister of the Interior, 3 Haw. 635,

'It is plainly to be seen that the Court here was dealing with the law applicable to the statute of limitations and the common law presumption of a lost grant was not involved in the case.' " (244.)

ARGUMENT

From what has already been said, it will appear to the Court that the case at bar involves a study of the evolution of Hawaiian land tenures, as without such study many things appearing in the record must be incomprehensible. It seems desirable, therefore, before discussing the errors relied upon, to relate as briefly and succinctly as possible the principal events of Hawaiian history connected with the evolution and establishment of its land tenures.

In the "Overland Monthly" of June, 1895, there appeared an article written by the Honorable Sanford B. Dole, formerly Associate Justice of the Supreme Court of Hawaii, then President of the Republic of Hawaii, and since Governor of the Territory of Hawaii, and later Judge

of the United States District Court in and for the District and Territory of Hawaii. This article traces the evolution of Hawaiian land tenures from the earliest times to the establishment of the Commission to Quiet Titles to Land, known as the Land Commission, established by legislative enactment on December 10, 1845. As this article presents the matters far more succinctly and interestingly than the writer of this brief could attempt to do, it has been considered desirable to incorporate the same in this brief, the gracious consent of Judge Dole having been secured December 17, 1920.

EVOLUTION OF HAWAIIAN LAND TENURES

(By the President of the Hawaiian Republic.)

When the Hawaiian pilgrim fathers first landed on the lonely coast of Hawaii from their long and exhausting ocean voyage in their canoes decked with mats and rigged with mat sails, it was for them a new departure in government and social and industrial economy. Their past, with its myths of origin, its legends of struggle and wandering, its faiths and customs, and rites and ceremonies, its lessons of victory and defeat, its successes over nature, was still their present authority and paramount influence, as they feebly began a new social enterprise upon the desolate yet grand and beautiful shores of their new inheritance. Their past still held them through its venerable sanctions, and yet they were free in the freedom of a new and unoccupied

land to add to its accumulations and to improve upon its lessons.

We may imagine that the remnant of the freight of their storm-worn canoes included a few household idols, a live pig or two, some emaciated chickens, a surviving bread fruit plant, and kou and other seeds. There were women as well as men in the company; the little children had succumbed to the hardships of the voyage, which was undertaken to escape the indignities and confiscations incident to the status of a defeated party in tribal warfare.

These people, lean and half famished, gladly and with fresh courage took possession of their new world. As soon as they recovered their strength they built a heiau (temple) and sacrificed to their gods.

After a little exploration they settled in a deep valley sheltered by steep cliffs and watered by an abundant stream of clear water abounding in fish and shrimps. At the mouth of the gorge was the sea, where there were shellfish, crabs, and a variety of fish. Fruits of various kinds flourished on the hillsides, with some of which they were acquainted while others were new to them. They found varieties of the kapa (native cloth) plant, and understanding the process of making its bark into cloth, they restored their wardrobe, which had for the most part disappeared in the vicissitudes of the voyage. They also discovered the taro (*arum eculentum*) growing wild in mountain streams, which they hailed as an old friend, feeling

that now their satisfaction with their new home was complete. The cultivation of this was begun at once as a field or dry land crop, as had been the practice in the home land, but as time went on and some crops failed for want of rain, irrigation was used, until at length, it may have been generations after, the present method of cultivating the crop in permanent patches of standing water became established. This result was greatly favored by the abundance of running water which was a feature of the country.

Children were born and grew up and intermarried, and the colony grew and prospered. Exploring parties went out from time to time and other watered valleys were found, and bays and reefs rich in fishing resources. As the community began to crowd the limited area of the valley which was their resting place, one and another of these newly discovered and favored localities was settled, generally by a family consisting of the parents and grown up boys and girls. And now and then new companies of exiles from the southern islands found their weary way over the ocean, bring perhaps later customs and adding new gods to the Hawaiian pantheon. So Hawaii was gradually populated, and when its best localities were occupied, Maui began to be colonized, and then its adjacent islands, until the whole group was stocked with people.

There may have been a few chiefs in the pioneer company who largely directed the affairs of the colony, and whose descendants furnished chiefs for the growing de-

mands of the branch colonies. Among the new arrivals also were occasional chiefs that were hospitably welcomed and accredited as such and accorded corresponding position and influence. It is also probable that in the very early period when chiefs were scarce the head men of some of the settlements that had branched off from the parent colony acquired the rank of chiefs, from the importance of their positions and the influence which their authority over the lands of their respective settlements naturally gave them. Such acquired rank descended to their children, in some cases doubtless with an increase of dignity due to marriages with women of chief rank; and so some new families of chiefs originating from the common people, or makaainanas, were established.

This early period of Hawaiian history for a number of generations was a time of industrial enterprise and peaceful and prosperous growth. There was no occasion for fighting, for there was land and water enough for all and everyone was busily employed. It was the golden age of Hawaii. There were taboos indeed, but only religious ones. No chief was powerful enough yet to proclaim taboos for political purposes, nor had the necessity for political taboos yet arisen. The arts prospered; the Hawaiian canoe developed; the manufacture of kapa flourished and made progress in the direction of variety of fabric and its esthetic decoration; royal garments of birds' feathers were manufactured; implements of stone and of wood for mechanical and industrial work were invented and improved

upon; and great engineering enterprises were undertaken, such as the irrigating systems of Wahiawa, Kapaa, and Kilauea, on the Island of Kauai, and great sea walls enclosing bays and reefs for fish ponds, such as the one at Huleia, on Kauai, and at many other places all over the Islands. The antiquity of some of these is so great that even tradition fails to account for their origin, as in the case of the parallel irrigating ditches at Kilauea on Kauai, the digging of which is attributed by the Hawaiians to the fabled moo, or dragon, and the deep-water fish-pond wall at the Huleia river on Kauai, which is supposed to have been built by the menehunes, the fabled race of dwarfs, distinguished for cunning, industry and mechanical and engineering skill and intelligence. In reality they were the pioneers of the Hawaiian race who took complete industrial and peaceful possession of the country, and this early period is distinctly of the period of menehunes or skillful workers.

Principles of land tenure developed slowly through this period, probably from some form of the patriarchal system into a system of tribal or communal ownership. There was land enough for everyone, and holdings at first were based upon possession and use. As in the irrigating customs of the Hawaiians, where there was an abundance of water, every taro grower used it freely, and at all times according to his own convenience, and there were no regulations, but in those localities where the water supply was lim-

ited, strict rules for its distribution grew up, so when the land was not occupied, there was freedom in its use, it being easier to locate new holdings than to quarrel about old ones. But as land irrigation developed, requiring permanent and costly improvements in the way of irrigating ditches and the building of terraces on the valley slopes for the foundation of taro patches, such improved localities acquired a special value, and the more real sense of ownership in land, which is based upon an investment of labor in the soil beyond the amount required for the cultivation of a crop, began. A quality of this ownership was necessarily permanent, because of the permanence of the improvements that created it.

Another element of tenure arose as the population increased and the best lands became occupied; the increasing demand gave them a market value, so to speak, which gave rise to disputes over boundaries. Although such feuds, sometimes attended with personal violence, favored the development of later feudalism of the Hawaiians, yet the early period, containing many of the features of tribal government and land tenure common to the Samoans, Fijians, and Maories of New Zealand, probably lasted a long time, with a gradual development of the principle of ownership in land and descent from parent to child subject to tribal control, until it was perhaps radically and violently interrupted by the turbulent times beginning in the thirteenth century, and lasting till the conquest of the group

by Kamehameha I. This was a period of internecine warfare promoted by the ambition of chiefs for political power and personal aggrandizement, and was most favorable to the growth of feudalism, which rapidly took the place of the previous political status.

As was inevitable under the new conditions, the importance and influence of the chiefs was greatly increased, to the immediate prejudice of the rights and privileges of the people, who were oppressively taxed in support of the wars brought on by the whim of their respective rulers, or to defend them from the attacks of ambitious rivals. The growing necessity for protection of life and property caused everyone to attach himself closely to some chief, who afforded such protection in consideration of service and a portion of the produce of the soil. Then the chiefs, as their power increased, began to levy contributions of supplies arbitrarily, until it came to pass that the chief was the owner of the whole of the products of the soil, and the entire services of the people, and so it was a natural consequence that he became finally the owner also of the soil itself. These results, which were hastened by the constant wars of this period, were yet of slow growth. The small valley and district sovereignties one by one disappeared in the clutch of rising warrior chiefs, who thus added to their dominions and power. As such principalities became formidable, it became necessary for the remaining smaller chiefdoms to ally themselves to some one of

them. And so this process went on until each island was at length under the control of its high chief, and then finally the whole group passed under the sovereignty of Kamehameha I, and the feudal program was complete.

During this period the control of the land became very firmly established in the ruling chiefs, who reserved what portions they pleased for their own use, and divided the rest among the leading chiefs subject to them. The position of the latter was analogous to that of the barons of European feudalism. They furnished supplies to their sovereign, and in case of war were expected to take the field with what fighting men their estates could furnish. These barons held almost despotic sway over their special domains apportioning the land among their followers according to the whim of the moment or the demands of policy, or farming it out under their special agents, the konohikis, whose oppressive severity in dealing with the actual cultivators of the soil was notorious. Thus the occupancy of land had now become entirely subject to the will of the ruling chief, who not only had the power to give but also to take away at its royal pleasure. This despotic control over land developed in the direction of greater severity rather than toward any recognition of the subjects' rights, and it finally became an established custom for a chief who succeeded to the sovereign power, even peacefully by inheritance, to re-distribute the land of the realm.

It is evident that this status was, for the time being,

disastrous and destructive to all popular rights in land that may have previously existed. If there was formerly anything like succession in tenure from father to son and tribal ownership, such holdings were now utterly destroyed, and the cultivators of the soil were without rights of cultivation or even of habitation. "The country was full of people who were 'hemo,' that is, dispossessed of their lands at the caprice of a chief. Three words from a new to a former konohiki, 'Ua hemo oe' (you are removed) would dispossess a thousand unoffending people and send them houseless and homeless to find their makamakas (friends) in other valleys." (Alexander's reply to Bishop Stanley.)

The redistribution of lands upon the accession of a ruling chief was naturally carried out with great severity when his accession was the result of civil war between rival factions or the triumph of an invading army. In the case of a peaceful accession of a young chief to sovereign power, the redistribution was mainly to his personal friends and companions, and was less complete than in the case of a revolution of force. Very influential men of the previous reign would not be disturbed, both because it would be dangerous and impolitic to do so, and because their assistance was desired. A curious survival of this feudal custom of a re-distribution of power and land upon the accession of new ruler is recognizable in the equally reprehensible sentiment of modern politics, expressed in the well-known words, "to the victors belong the spoils."

When Kamehameha I. conquered the group, excepting the island of Kauai, which was accomplished only after the most desperate fighting, his success carried with it the fullest and severest application of this custom, and it meant to his defeated enemies loss of all political power and of the lands which were the basis of such power. The island of Kauai, through the treaty of annexation between the king of that island, Kaumualii, and Kamehameha, might have escaped such misfortunes but for the rebellion of Humehume, the son of Kaumualii, some years later, which, being suppressed, subjected the insurgent chiefs to the rigorous rule of confiscation of their lands and the annihilation of their political influence.

Thus Kamehameha became at last, through these feudal customs and by virtue of his conquest, the fountain head of land tenures for the whole group. The principles adopted by the Land Commission in 1847 opens with the following statement:

“When the Islands were conquered by Kamehameha I. he followed the examples of his predecessors and divided the lands among his principal warrior chiefs, retaining, however, a portion in his hands to be cultivated or managed by his own immediate servants or attendants. Each principal chief divided his lands anew, and gave them out to an inferior order of chiefs or persons of rank, by whom they were subdivided again and again, passing through the hands of four, five, or six persons, from the king down to

the lowest classes of tenants. All these persons were considered to have rights in the lands or productions of them. The proportions of these rights were not very clearly defined, but were, nevertheless, universally acknowledged."

During Kamehameha's long and vigorous reign, affairs became unsettled to an extent to which the country had been unaccustomed. Long and undisturbed possession of their lands by chiefs was a preparation for the development of a sentiment favorable to permanent individual rights in land. Such a sentiment had become well defined in the mind of Kamehameha before his death, and may be regarded as the seed germ of a system of land tenures which afterwards developed.

Many of those who have been interested in this subject have been accustomed to regard the idea of private rights in land in these islands as one of foreign introduction during the reign of Kamehameha III., at which time the remarkable change from feudal to private real estate control took place. But the landed reforms of that reign were the results of causes which had been long and powerfully at work. The century plant had slowly grown, but when its full time came it swiftly and abundantly blossomed.

At the meeting of chiefs at Honolulu upon the arrival of the frigate "Blonde" in 1852 with the remains of Kamehameha II. and his wife, to consider the question of the succession to the throne and other matters, as reported in the "Voyage of the Blonde," page 152 and following,

Kalaimoku, the agent, in his address to the council, referred to the inconveniences arising from the reversion of lands to the king on the death of their occupants, a custom partially revived under Kamehameha II., but which it had been the object of Kamehameha I. to exchange for that of hereditary succession. This project of their great king he proposed to adopt as the law, excepting in such cases as when a chief or landholder should infringe the laws, then land should be forfeited and himself tabooed. Several chiefs at once exclaimed, "All the laws of the great Kamehameha were good; let us have the same!"

Lord Byron, captain of the "Blonde," presented the council some written suggestions in regard to the administration of affairs which are contained in the following article:

"That the lands which are now held by the chiefs shall not be taken from them, but shall descend to their legitimate children, except in cases of rebellion, and then all their property shall be forfeited to the king."

The account proceeds as follows: (page 157):

"These hints, it will be at once perceived, are little more than a recommendation quietly to pursue the old habits and regulations of the Islands. Kamehameha I. had begun to establish the hereditary transmission of estates, and Lord Byron's notice only adds the sanction of the British name to it."

The principle adopted previously to the reign of Ka-

mehameha III. greatly influenced the progress of events.

When after the death of Kamehameha I. his son Liholiho, came to the throne as Kamehameha II., the administration of the government was shared by him with Kaahumanu, the kuhina nui (a premier or minister having a veto on the king's acts), one of Kamehameha's widows, and a woman of great force of character. It was the desire of Kamehameha II. to make a redistribution of the lands of the realm according to custom, but Kaahumanu was opposed to it, and her influence, together with the united strength of the landed interests which had become firmly established in the chiefs during the long reign of Kamehameha I., was too strong for him, and beyond a few assignments among his intimate friends, he relinquished his purpose. The distribution of lands, therefore, by Kamehameha I. remained for the most part as a permanent settlement of the landed interests of the kingdom, to be afterwards modified in favor of the common people of the government, but never ignored.

During the period from the distribution of lands by King Kamehameha I., about 1795, till the year 1839, the sovereign held a feudal authority over the whole landed estate of the kingdom, which included the right, as above set forth, summarily to cancel the rights in the lands of any chief or commoner. There was a growing tendency, however, during this period toward the provision in favor of the descent of lands from parent to child adopted by

the chiefs upon the return of the "Blonde," and the feudal right of the sovereign over the land of the subject was more rarely exercised as time went on. Increasing security in tenure led to increasing activity in land transactions. Chiefs transferred lands to others, and they became a marketable commodity; there was buying and selling, some speculating. The sovereign gave away and sold lands here and there. Foreigners became landholders. Still there was no permanence in the tenure, the enactment by the chiefs at the time of the "Blonde" being in the nature rather of an expression of an opinion than a binding law. The kingdom was then under the regency of Kaahumanu and Kalanimoku, and Kamehameha III., being still a minor, was not a party to this provision and it was not regarded as binding upon him.

The status of land matters at this time was similar to that which existed in England after the Norman conquest, but there the progress of events, owing undoubtedly to the influence of a foreign civilization, was far more rapid than here. The possession of land by foreigners with strong governments back of them, represented here by men-of-war and zealous consuls, had a stimulating effect upon this movement. It was a transition period; the strength of the feudal despotism was fast waning and there was as yet nothing of a positive nature to take its place. This uncertainty in regard to land was a serious obstacle to material progress. The large landholders, the chiefs and

some to whom they had given or sold their lands, felt a degree of security in their holdings through the growing sentiment toward permanent occupation and hereditary succession; but this was insufficient to place land matters upon a satisfactory footing and to justify extensive outlays in permanent improvements. Moreover, that class of occupiers of land known as tenants, which class included a large proportion of the common people, was still in a condition which had scarcely felt the favorable influences which had begun to improve the status of the chiefs. They were hardly recognized as having civil rights, although they enjoyed freedom of movement and were not attached to any particular lands as belongings of the soil. If a man wanted a piece of land to live on and cultivate, he had to pay for it by a heavy rent in the shape of weekly labor for his landlord, with the additional liability of being called upon to assist in work of a public character, such as building a heiau (temple) or making a road or fish-pond seawall. With all this, the tenant was liable to be ejected from his holding without notice or a chance of redress. That this defenseless condition of the common people was rigorously taken advantage of by landholding chiefs and their kono-hikis, we have the evidence of those living in this period, including some of the early missionaries, that it was a feature of the times that large numbers of homeless natives were wandering about the country. This want of security in the profits of land cultivation led many to attach them-

selves to the persons of the chiefs as hangers-on, whereby they might at least be fed in return for the desultory services which they were called upon to perform. This practice of hanging-on, or following a chief for the sake of food, was a feature of the perfected feudalism, when insecurity of land tenure was at its height, and the word defining it, *hoopilimeaa*i, probably originated at that period.

In 1833, Kamehameha III., then twenty years old, assumed the throne, and soon became deeply interested in public affairs. In many ways the unsatisfactory status of land matters was pressed upon his attention. The growing sentiment towards permanence in tenure powerfully influenced the situation. The defenseless and wretched condition of the common people in regard to their holdings appealed to his humanity and to his sense of responsibility as their ruler. The inconsistency of his sovereign control of all the lands of the kingdom with any progress based upon the incoming tide of civilization became more and more evident every day.

The increasing demand among foreigners for the right to buy and hold land was an element of importance at this national crisis and doubtless had much to do in hastening the course of events. The king not only consulted the great chiefs of the realm, who certainly were in favor of permanence of tenure for themselves, but he also conferred with foreigners on the subject. In 1836 Commodore Kennedy and Captain Hollins visited Honolulu in

the United States ships *Peacock* and *Enterprise*, and during their stay held conferences with the chiefs, in which the question of land tenure was discussed. In 1837, Captain Bruce of the British frigate *Imogene* had several meetings with the chiefs in regard to matters of government, when, in all probability, land matters were considered. The influence of Mr. Richards, for a long time the confidential adviser of the chiefs, was undoubtedly very great with the king in leading his mind to the definite conclusion that he reached in 1839, in which year, on the 7th day of June, he proclaimed a Bill of Rights which has made his name illustrious and the day on which it was announced worthy of being forever commemorated by the Hawaiian people. This document, though showing in its phrases the influence of the Anglo-Saxon principles of liberty, of Robert Burns and the American Declaration of Independence, is especially interesting and impressive as the Hawaiian Magna Charta, not wrung from an unwilling sovereign by force of arms, but the free surrender of despotic power by a wise and generous ruler, impressed and influenced by the logic of events, by the needs of his people, and by the principles of the new civilization that was dawning on his land.

The following is a translation of this enlightened and munificent royal grant:

“God hath made of one blood all nations of men to dwell on the earth in unity and blessedness. God hath also bestowed certain rights alike on all men and on all chiefs, and all people of all lands

"These are some of the rights which He has given alike to every man and every chief of correct deportment: life, limb, liberty, freedom from oppression, the earnings of his hands and the productions of his mind, not, however, to those who act in violation of the laws.

"God has already established government and rule for the purpose of peace; but in making laws for the nation, it is by no means proper to enact laws for the protection of the rulers only, without also providing protection for their subjects; neither is it proper to enact laws to enrich the chiefs only, without regard to enriching their subjects also, and hereafter there shall by no means be any laws enacted which are at variance with what is above expressed, neither shall any tax be assessed, nor any service or labor required of any man in a manner which is at variance with the above sentiments.

The above sentiments are hereby proclaimed for the purpose of protecting alike both the people and the chiefs of all these islands while they maintain a correct deportment; that no chief may be able to oppress any subject; but that chiefs and people be able to enjoy the same protection under one and the same law.

"Protection is hereby secured to the persons of all people, together with their lands, their building lots, and all their property, while they conform to the laws of the kingdom and nothing whatever shall be taken from any individual except by express provision of the laws. What-

ever chief shall act perseveringly in violation of this declaration shall no longer remain a chief of the Hawaiian Islands, and the same shall be true of the governors, officers, and all land agents. But if anyone who is disposed should change his course and regulate his conduct by law, it shall then be in the power of the chiefs to reinstate him in the place he occupied previous to his being deposed."

It will be seen that this Bill of Rights left much to be done in defining the rights in land granted by it. It appears by the constitution enacted by the king, the kuhina nui, or premier, and the chiefs the following year, that the feudal right of controlling transfers was still retained in the sovereign, in the following words:

"Kamehameha I. was the founder of the kingdom, and to him belonged all the land from one end of the islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I. was the head and had the management of the landed property. Wherefore there was not formerly, and is not now, any person who could or can convey away the smallest portion of land without the consent of the one who had, or has, the direction of the kingdom."

The Bill of Rights promoted activity in land matters, and for the next few years difficulties arising from land disputes pressed upon the king, producing great confusion and even endangering the autonomy of the kingdom. In 1841, Ladd & Company, the pioneers in sugar cultivation in this

country, obtained from the king a franchise that gave them the privilege of leasing any unoccupied lands for one hundred years at a low rental. This franchise was afterwards transferred to a Belgian colonization company of which Ladd & Company were partners, under circumstances that made a good deal of trouble for the Hawaiian government before the matter finally disappeared from Hawaiian politics. The intimidation of the king by Lord Paulet, captain of the British frigate *Carysfort*, under which the provisional cession of the country to England was made in 1843, was based largely upon a land claim of Mr. Charlton, an Englishman, which was regarded by the king as illegal, but which he finally endorsed under Paulet's threat of bombarding Honolulu. These troubles naturally developed among the Hawaiians an opposition to the policy of allowing foreigners to acquire land which, in 1845, reached the definite stage of political agitation and petitions to the government.

During these years of undefined rights, the common people were protected in their holdings by law to a certain extent, but their tenure was based mainly upon their industrious cultivation of their lands, except as to house lots, and the payment of rent in labor. The question of the proportionate interests of the king, the chiefs, and the common people, in the lands of the kingdom was one of great difficulty. As we have seen the Constitution of 1840 distinctly recognized such a community of interest, but Hawaiian

precedents threw no light upon the problem of division. It had been a new departure to admit that the people had any inherent right to the soil, and now to carry out that principle required the adoption of methods entirely foreign to the traditions of Hawaiian feudalism.

In this transition time the necessity of an organized government separate from the person of the king became apparent to the chiefs, and this was carried out by three comprehensive acts in 1845, 1846, and 1847. The first, "to organize the executive ministry of the Hawaiian Islands"; the second, "to organize the Executive Departments of the Hawaiian Islands"; and third, "to organize the Judiciary Department of the Hawaiian Islands." As soon as the existence of a responsible government detached from the person of the king became an accepted feature of the political system, it was felt that in some way or other the government ought to have public lands and become the source of land titles. At this inception the government as a distinct organization was possessed of no landed property; it may be said to have had a right to that portion of the king's interest in the landed property of the kingdom which he held in his official capacity, in distinction from that which belonged to him in his private capacity; but this was a mere theoretic right, dimly recognized at first, and only after innumerable difficulties and fruitless expedients was it finally developed and carried out in the great *mahele*, or division of lands between the king, the chiefs,

and people, in 1848. Elaborate laws were made for the purchase of land by the government from private landholders, which do not appear to have added materially to the public domain.

The act to organize the Executive Department contained a statute establishing a Board of Royal Commissioners to Quiet Land Titles. This statute was passed December 10th, 1845. It was a tentative scheme to solve the land problem, and though not in itself sufficiently comprehensive for the situation, it was in the right direction, and led, through the announcement of principles of land tenure by the commission, which were adopted by the Legislature, to a better understanding of the subject, and finally, in the latter part of 1887 (1847?) to the enactment by the king and privy council of rules for the division of the lands of the kingdom, which, with the statute creating the Land Commission and the principles adopted by them, formed a complete and adequate provision for the adjustment of all recognized interests in land on the basis of the new departure of the principles of tenure.

At the time of the creation of the Board of Commissioners to Quiet Land Titles and up to the enactment of rules by the privy council for land division, the nation was still feeling its way through the maze of the difficult questions that were pressing upon it in this great reform in land matters. Each step it made threw light upon the path for the next one. The rapidity with which this reform

was accomplished must be attributed not only to the wisdom and fidelity of the advisers of the nation, but largely to the earnestness and patriotism of the king and chiefs, who cheerfully made sacrifices for the sake of a satisfactory solution of these questions.

The Commissioners to Quiet Land Titles were authorized to consider claims to land from private individuals, acquired previous to the passage of the act creating the commission. This included natives who were in the occupancy of holdings under the conditions of use or payment of rent in labor, and also both natives and foreigners who had received land from the king or chiefs in the way of grants. The awards of the Board were binding upon the government if not appealed from, and entitled the claimant to a lease or a royal patent, according to the terms of the award, the royal patent being based upon the payment of a commutation of one quarter or one third of the unimproved value of the land, which commutation was understood to purchase the interest of the government in the soil.

The principles adopted by the Land Commission use the words king and government interchangeably, and failed to reach any adjudication of the separate rights of the king in distinction from those of the government in the public domain, or in other words they failed to define the king's public or official interests in distinction from his private rights, although they fully recognized the distinc-

tion. There was, however, an implied apportionment of these two interests through the proceedings by which an occupying claimant obtained an allodial title. The commission decided that their authority coming from the king to award lands represented only his private interests in the lands claimed. Therefore, as the further payment of the claimant as a condition of his receiving a title in fee simple from the government was one third of the original value of the land, it follows that the king's private interest was an undivided two thirds, leaving an undivided one-third belonging to the government as such.

The commission also decided that there were but three classes of vested or original rights in land, which were in the king or government, the chiefs and the people, and these three classes of interest were about equal in extent.

The Land Commission began to work February 11th, 1846, and made great progress in adjudicating claims of the common people, but its powers were not adequate to dispose of the still unsettled questions between the king, the chiefs, and the government, though it must be admitted that it made progress in that direction. Neither were the chiefs ready to submit their claims to its decision.

After earnest efforts between the king and chiefs to reach a settlement of these questions, the rules already referred to were unanimously adopted by the king and chiefs in Privy Council, December 18th, 1847. These rules, which were drawn up by Judge Lee, embodied the following

points: The king should retain his private lands as his individual property, to descend to his heirs and successors; the remainder of the landed property to be divided equally between the government, the chief, and the common people.

So the land was all held at this time by the king, the chiefs, and their tenants, this division involved the surrender by the chiefs of a third of their lands to the government, or a payment in lieu thereof in money, as had already been required of the tenants landholders. A committee of which Doctor Judd was chairman was appointed to carry out the division authorized by the Privy Council, and the work was completed in forty days. The division between the king and the chiefs was effected through partition deeds signed by both parties; the chiefs then went before the Land Commission and received awards for the lands thus partitioned off to them, and afterwards many of them commuted for the remaining one third interest of the government by a surrender of a portion.

After the division between the king and the chiefs was finished, he again divided the lands that had been surrendered to him between himself and the government, the former being known thereafter as crown lands and the latter as government lands.

This division with the remaining work of the Land Commission completed the great land reform, the first signal of which was announced by Kamehameha III. in his

Declaration of Rights, June 7, 1839. A brief ten years had been sufficient for the Hawaiian nation to break down the hoary traditions and venerable customs of the past, and to climb the difficult path, from a selfish feudalism to equal rights, from royal control of all the public domain to present proprietorship and fee simple titles for the poor and for rich. It came quickly and without bloodshed because the nation was ready for it. Foreign intercourse, hostile and friendly, and the spirit of a Christian civilization had an educating influence upon the eager nation united by the genius of Kamehameha I., with its brave and intelligent warrior chiefs resting from the conquest of arms, their exuberant energies free for the conquest of new ideas. With rare wisdom, judgment, and patriotism, they proved equal to the demands of the time upon them.

SANFORD B. DOLE.

FURTHER OF THE LAND COMMISSION:

On December 10, 1845, a law was enacted providing for the appointment of a commission to quiet land titles "for the investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any landed property acquired anterior to the passage of this act; the awards of which board, unless appealed from as hereinafter allowed, shall be binding upon the Minister of the Interior and upon the applicant."

The act, which is reprinted in the Revised Laws of Hawaii of 1905, pages 1160, et seq., provides that the commission, during the continuance of its sessions, should advertise in the "Polynesian" newspaper, a notice of its sittings, including the following:

"All persons are required to file with the board specifications of their claims to land, and to adduce the evidence upon which they claim title to any land in the Hawaiian Islands, before the expiration of two years from this date, or in default of so doing, they will after that time be forever barred of all right to recover the same, in the courts of justice."

Section 8 of the act provides as follows:

"All claims to land, as against the Hawaiian government, which are not presented to said board within the time, at the place and in the manner prescribed in the notice required to be given in the fifth section of this article SHALL BE DEEMED TO BE INVALID, AND SHALL BE FOREVER BARRED IN LAW, unless the claimant be absent from this kingdom, and have no representative therein."

Section 6 of this act provided that the board shall exist for the quieting of land titles during two years from the first publication of the notice above referred to.

The commission was duly appointed and published its first notice on February 14, 1846.

On August 20, 1846, the commission adopted certain principles for their adjudication of claims presented to them, which principles were ratified and confirmed by the nobles and representatives in Legislative Council, on October 26, 1846. They provide *inter alia* as follows:

“It being therefore fully established that there are but three classes of persons having vested rights in the land,—1st, the government, 2nd, the landlord, and 3rd, the tenant, it next becomes necessary to ascertain the proportional rights of each. . . . it is altogether probable that since the act of 1839 a few individuals may have acquired allodial ownership of landed property, either by purchase or by voluntary grant on the part of the king. Such ownership must be proved or it cannot be acknowledged; for the king, representing the government, having formerly been the sole owner of the soil, he must be considered to be so still, unless proof be rendered to the contrary; and even possession of ever so long standing cannot be proof of anything more than that which is specified above as belonging to the landlord, or to the landlord and tenant, as the case may be.”

The seventh paragraph of the principles provides as follows:

“The titles of all lands, whether rightfully or wrongfully claimed, either by natives or foreigners,

in the entire kingdom, which shall not have been presented to this board for adjudication, confirmation or rejection, on or before the 14th day of February, 1848, ARE DECLARED TO BELONG TO THIS GOVERNMENT, by section 8th of the article creating this board. Parties who thus neglect to present their claims, do so in defiance of the law and cannot complain of the effect of their own disobedience."

The "principles" further provided that

"The patents and leases are recorded in duplicate, in the Department of the Interior. This will enable the foundation of everyone's right to be known to the Government, and inquiring parties. No pretended ownerships can exist without the means of undeceiving the public in regard to them. Subsequent purchasers and mortgagees need not be in ignorance of prior defects in the title, or of prior incumbrances."

By an act of November 7, 1846, it was provided that

"If any konohiki wish to have his portion of any given ili or ahupuaa set off to him according to his rights in the same, that he may procure an allo-dial title therefor, he may petition the Minister of the Interior, on stamped paper, who shall have power, with the approbation of His Majesty in Privy Council, to complete the arrangements for the

same, after which there shall be given to the kono-hiki a patent for the same in accordance with Act 2, part 1, chapter 7, article 2."

As a part of the great system of quieting the title of lands of the islands, in 1848 there was a Great Mahele or division between the king and the chiefs. This mahele did not create or establish title; a subsequent award by the Land Commission or by the Minister of the Interior being necessary (*Kenoa v. Meek*, 6 Haw. 63;; *Kanaiana v. Long*, 3 Haw. 332). The mahele gave the right to the chiefs to present their claims to the lands named to the Land Commission and obtain an award therefor. Thereupon, the chiefs, upon the payment to the Government of certain fees or the relinquishment to the government of a portion of their lands, were entitled to receive a royal patent covering the land awarded.

By an act of the Legislature of June 7, 1848, certain large divisions of land were set apart to be the private lands of His Majesty Kamehameha III.; others were set apart to the Hawaiian government, and others were set apart for the use of the fort in Honolulu. Kioloku is not named in any of the lands enumerated in these lists.

By the act of June 13, 1848, the powers of the Board of Commissioners were extended for such a period of time from the 14th day of February, 1849, as shall be necessary for the full and faithful examination, settlement, and award upon all such claims as may have been presented to said board.

By an act approved May 26, ¹⁸⁵²~~183~~, it was provided that all claimants of land who have entered their claims with the Board and who shall not have appeared before the Board and proved their claims previous to the first day of May, 1854, shall be forever barred from proving the same.

By an act approved July 20, 1854, it was provided that the Board of Commissioners should be dissolved on the last day of March, 1855. By this act it was provided that

“All awards for land claims which may be remaining in the hands of the said Board or its agents, together with all the books and papers belonging to the said board, at the time of its dissolution shall be delivered into the hands of the Minister of the Interior for safe keeping, by a detailed inventory particularly describing the books and marking all important documents by numbers, of which inventory there shall be two identical copies, one of which shall remain with the Supreme Court, and the other with the Minister of the Interior, whose duty it shall be to deliver the remaining awards to the parties interested, on payment of the costs.”

By an act approved August 24, 1860, known as the “Konohiki’s Act,” it was provided that the Minister of the Interior is authorized to grant awards for their lands to all konohikis who have failed to receive the same from the Land Commission, provided that the names of such konohikis appear in the Mahele Book of the Year 1848, and all

awards so granted by said minister shall be equally valid with those of the Land Commission.

These statutory provisions relating to the lands of the Islands have frequently received the attention of the Supreme Court of Hawaii. To a few of these cases we wish to call the court's special attention.

Thurston v. Bishop, 7 Haw. 421.

This was an action in ejectment brought by the Minister of the Interior against the Trustees of the Estate of B. P. Bishop, deceased. It was tried before the Honorable Sanford B. Dole, jury waived. It related to a piece of land in Honolulu known as "Opu." It appeared from the admission of the parties that no claim to the land had been presented to the Commission to Quiet Land Titles within the time limited by statute for filing such claims, and the land had not been awarded by the Commission to anyone, nor had a Royal Patent been issued to anyone for it. The land was in the possession of defendants who held whatever interest was in Lot Kamehameha at the time of his death. Lot Kamehameha received the land by oral bequest in 1840 from a high chief who was then in possession of the land. It was held that

"By force and effect of the statute creating the Land Commission (Section 8, Acts of 1846, p. 109), the claim which defendants' predecessor had to this land was barred in law by reason of its non-presentation to the Commission, and they have no title

to it; the land not being held by defendants by some title proceeding from the government, it is still the property of the government. The Declaration of rights in the Constitution of 1840, securing to the people their lands, is not violated by the bar in the statute above referred to, for at the time of the Declaration of Rights the people had no titles to land, and the statute provided a method by which titles could be obtained."

And it was further held that

"The defendants not showing any title or right of possession to this land, their possession as against the government can never ripen into a title."

Kahoomana v. Minister of the Interior, 3 Haw. 635.

This was an action in ejectment for the possession of the premises upon which the government buildings are now situated, commonly called Mililani. The plaintiff claimed title through Manuia and his wife Kaupena, who had occupied the land in 1829. Neither Kaupena nor her successors in interest had received an award of the Land Commission for the land, and the court held that

"The Land Commission, however, did not award it, and by the force and effect of the statutes above quoted it must be considered to still belong to the government.

Kenoa v. Meek, 6 Haw. 63.

This was an action in ejectment brought to recover possession of a piece of land known as "One half of Kalena, Waianae." Kenoa's ancestor Pahoa received from Kamehameha III. a mahele of this land in February, 1848, but failed to present his claim for the land to the Land Commission. The court held that

"In my view, as Pahoa neglected to perfect his title before the Board of Land Commission but suffered his claim to be barred, the legal title remained in the government and the Royal Patent to A. Bishop conveyed their title to him, and it was prior to the patent issued to Pahoa it must prevail."

See also:

Kaelekolani v. Robinson, 2 Haw. 522;

The Estate of Kamehameha IV., 2 Haw. 715;

Harris v. Carter, 6 Haw. 195;

Atcherley v. Lewers and Cooke, 18 Haw. 625;

In re Pa Pelekane, 21 Haw. 175;

Kapiolani Estate v. Atcherly, 21 Haw. 441;

From the foregoing the following propositions are clear:

FIRST: ORIGINALLY ALL LANDS WERE THE PROPERTY OF THE GOVERNMENT.

SECOND: THE GOVERNMENT COULD BE DIVESTED OF TITLE BY THE FOLLOWING METHODS:

(A) BY AN AWARD OF THE LAND COMMISSION, BASED UPON THE MAHELE OF 1848.

(B) BY AN AWARD OF THE LAND COMMISSION BASED UPON PRIOR GIFT BY THE KING.

(C) BY AN AWARD OF THE MINISTER OF THE INTERIOR BASED UPON THE MAHELE OF 1848,

(D) BY ROYAL PATENT (GRANT) BASED UPON A SALE OR EXCHANGE.

(E) BY ROYAL PATENT (GRANT) BASED UPON THE MAHELE.

THIRD: ANY LAND NOT CONVEYED BY ONE OF THE FOREGOING METHODS FALLS INTO THE CLASS OF "UNASSIGNED LANDS," AND REMAIN THE PROPERTY OF THE GOVERNMENT.

ERRORS RELIED UPON.

Assignments Nos. 8 and 9. These assignments are as follows:

Eighth. The Supreme Court of the Territory of Hawaii erred in holding and deciding as follows:

"The fact that Mr. Kanakanui's search has revealed the existence of no record of an award of Kioloku taken together with the recitation contained in the petition of Kalakaua constitutes the strongest circumstances in the case of the Territory. This evidence, weighty as it may seem, appears to be overcome by other facts forming a

combination of circumstances which irresistibly lead to the conclusion that Kioloku had been awarded to Ane Keohokalole, namely, the facts that she was exercising dominion over this property as early as 1861, that in the partition deed of 1870, this land was set apart to Kalakaua and in 1873 the boundaries were settled upon his application with the knowledge and acquiescence of the king and the government; that from 1870 down to 1913, a period of forty-three years, the several successive governments of Hawaii recognized Kioloku as the property of Kalakaua and his successors in interest; that during this entire period no claim whatsoever was asserted by the government or by any representative thereof to Kioloku, and during the whole period the property was assessed as the property of Kalakaua and his successors in interest and taxes were collected by the government down to the date of the institution of this proceeding."

Ninth. The Supreme Court of the Territory of Hawaii erred in holding and deciding as follows:

"The evidence introduced on behalf of the company we deem to be sufficient to sustain the Judge of the Land Court in presuming that a grant of Kioloku was issued to Ane Keohokalole, the grant itself having been lost or for other reasons cannot now be produced."

It is the contention of the petitioner that no award, grant or patent of Kioloku was ever issued by the government.

In support of this contention the petitioner relies upon the following:

First: The law required that copies of every award, grant or patent should be preserved, and an examination of those copies fails to show the existence of any award, grant or patent affecting the land in question.

To prove the contention of the government that Kioloku is "unassigned land," Mr. S. M. Kanakanui was called as a witness. He testified that he is a surveyor by profession; that he is employed in the Land Office as a title searcher, having held that position for over a year, prior to which time he was in the Government Survey Department for nearly thirty years. He had had occasion during his professional employment to investigate the title of Kioloku. (Rec. 78.) The following questions were propounded to him and answers received:

Q. Have you found any land commission award, any royal patent or any grant of the land of Kioloku to anyone?

A. In my search I failed to find the--any award of any land contained in the Mahele of 1848, neither in the award of the land commissioners, nor in the grants issued by the government, nor in the -- in any other disposition made by the government of the land of Kioloku in Kau.

Q. And your search has been exhaustive on those matters.

A. Yes, sir.

Q. How exhaustive has been your search of these records, Mr. Kanakanui?

A. Oh, as far as my time and my ability serves.

Q. Beginning with the Mahele Book, have you examined the book of Mahele?

A. I did.

Q. Is there is in the Mahele Book any division mentioning the land of Kioloku?

A. There is not.

Q. Referring to Caesar Kapaakea, the father of Kalakaua is there any mahele of land in the Mahele Book relating to his land?

A. Yes, sir, there are.

Q. In the Mahele Book is there any mention under the head of Caesar Kapaakea of the land of Kioloku?

A. There is no mention.

Q. It is neither set apart to Kapaakea nor set apart for the king?

A. Yes, sir, it is not.

THE COURT: Q. Not, you say?

A. Not.

MR. LIGHTFOOT: Q. Referring now to the Mahele Book under the name of Ane Keohokalole, wife of Caesar Kapaakea, is there in the Mahele Book any mahele of the land of Ane Keohokalole?

A. There is a mahele.

Q. There is a mahele?

A. Yes; land of Keohokalole, but the Kioloku land, now under consideration is not contained in the mahele, either to Keohokalole herself or to Kamehameha III.

Q. And no mention is made—

A. And no mention is made.

Q. —of Kioloku in that mahele?

A. No.

Q. Referring to the records of the Privy Council, have you examined those records with reference to the land of Kioloku?

A. I have examined them, yes sir.

Q. And they are all now indexed, are they not?

A. Yes, sir.

Q. In the archives. Have you examined the indexes?

A. I did not.

Q. COURT: But you have examined the records, you say?

A. I have, the records in the Privy Council.

THE COURT: Q. As I understand, you have examined the records themselves?

A. Yes, sir.

MR. LIGHTFOOT: Q. Did you find in the record of the Privy Council any reference to the land of Kioloku?

A. I didn't find any mention of the land of Kioloku in the record. I have looked into the Privy Council.

Q. Have you examined the books of the Land Commission Awards of the Land Commission?

A. I have.

Q. Do the indexes of these books—they are indexed, are they not?

Q. Have you examined the indexes of those books?

A. Yes.

A. Yes, sir.

Q. Q. Is there in those books any award of the ahupuaa of Kioloku?

A. Award of the Ahupuaa of Kioloku?

Q. Yes.

A. There is none. There is none on the books of the Land Commission,

Q. You seem to lay stress upon the word "Ahupuaa" there. Is there any award of the land of Kioloku irrespective of whether it is an ili aina or an ahupuaa or lele or any other award of Kioloku?

A. There are a few awards. There are a few small awards to natives.

Q. That is, kuleanas within the—

A. Within the ahupuaas of Kioloku.

Q. But no award of the whole land?

A. Eh?

Q. But no award of the land as described in this petition?

A. No award. No award of the ahupuaa itself.

Q. The only awards being of the kuleanas within the ahupuaa?

A. Yes.

Q. And those awards that you have found in the Land Commission Award books have not described the land claimed in the present petition?

A. Those small awards? They are within the bounds of the land of the petition.

Q. Coming down to the Royal Patents, have you examined the records of all royal patents granted?

A. I have.

Q. Have you found any records of any royal patents either to Kapaakea, to Annie Keohokalole, or anyone else of the Ahupuaa of Kioloku?

A. In my examination of the patents to Kapaakea and Keohokalole I found that the land of Kioloku did not, was not included in any of those patents.

Q. In any of the royal patents?

A. And not in any other patent.

Q. And not in any other patent?

A. Yes.

Q. Or patent grant, royal patent,

A. Or patent grant, yes.

Q. Or land grant?

A. Patent grant and land grant is the same.

Q. Have you examined any other books of the government; that is, other than those heretofore enumerated, showing grants of land by the government to private individuals or corporations?

A. I have examined the record of the deeds, of the government deeds to private parties and I found that the land of Kioloku was not included in any of those deeds.

Q. Is there any record in any grant in the records of school lands of Kioloku?

A. School lands?

Q. Yes; it is not in the list of school lands?

A. Not in the list of school lands.

Q. Or of Crown lands?

A. Or the what?

Q. Or the Crown lands?

A. Neither in the school lands nor in the Crown lands.

(Record, 79 to 83 inclusive.)

The petition in this case was filed on August 1, 1913, and it was not until December, 1918, that the cause came on for hearing in the Land Court. In the meantime there had been a report of the "Examiner of Titles," an officer of the Land Court, adverse to the contestant. At all times the records of the government had been open to examination by the contestant, and there had been ample time to make a thorough search for any award, grant or patent.

The burden of proving a negative, to-wit, that no grant had ever been made, conveying this land was, in the first place, on the petitioner. Having presented a *prima facie* case, it became the duty of the contestant to overcome this case, especially in view of the fact that the public records

are open to the contestant as well as the petitioner, and in view of the further fact that if any grant had actually been made, the evidence of such grant would naturally be rather with the contestant than with the petitioner.

“It is a general rule of evidence, noticed by the elementary writers upon that subject, 1 Greenl. Ev., p. 79, ‘that where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party.’ When a negative is averred in pleading, or plaintiff’s case depends upon the establishment of a negative, and the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative.” *United States v. Denver etc. R. Co.*, 191 U.S., 84-92, 48 Law. Ed., 106.

See also:

Arthur v. Unkart, 96 U. S. 122, 24, L. Ed. 768;

Toleman v. Portbury, L. R. 5, Q. B. 288;

Colorado Coal, etc., Co. v. United States, 123 U. S. 307-317, 31 Law. Ed. 182;

U. S. v. American Bell Telephone Company, 126 U.S. 224-242, 42 Law. Ed. 144.

SECOND: THE ABSENCE OF AN AWARD, PATENT OR GRANT OF KIOLOKU IS PROVEN FROM THE FACT THAT THERE IS NO MAHELE OF THE SAME TO ANE KEOHOKALOLE.

It has been seen that there are two methods by which Ane Keohokalole could have acquired title, the first being by award of the Land Commission, and the second by patent of the Minister of the Interior on the recommendation of the King in Privy Council. In the Mahele Book of 1848 there is contained the Mahele between Ane Keohokalole and the king. The lands maheled to the chief or chiefess are contained on one page of the book and on the opposite page are written those maheled to the king. Petitioner's Exhibit "F" (Record 315, 316, 317 and 318) is a list of the lands maheled to the king under the heading of "Ko Kamehameha III" (for Kamehameha III), and also the lands maheled to Keohokalole under the heading "Ko Keohokalole," the former list being signed by Keohokalole and the latter by Kamehameha III, on January 28, 1848. There are thirty-nine lands maheled to the king and thirty-nine lands maheled to Keohokalole. There are seven lands maheled to the king situated in the District of Kau, Island of Hawaii (the same District as Kioloku) and nine lands maheled to Keohokalole in the same district; but Kioloku

is not included in either Keohokalole's mahele or that of the king.

Without a mahele of the land to the chief there could be no award by the Land Commission, and it is not surprising, therefore, that a search among the awards of the Land Commission did not reveal any award to Keohokalole of the Land Commission, and the absence of such a mahele constitutes absolute proof that there was no award of the Land Commission and it must be remembered that it was the award of the Land Commission which created the title.

THIRD: THE ABSENCE OF REFERENCE TO KIOLOKU IN THE RECORDS OF THE PRIVY COUNCIL SHOWS THAT THERE WAS NO GRANT OF KIOLOKU BY THE MINISTER OF THE INTERIOR ON THE AUTHORIZATION OF THE KING IN PRIVY COUNCIL.

It has been pointed out that the King in Privy Council might authorize the Minister of the Interior in certain cases to issue patents to the chiefs, which patents are described as Royal Patent Grants. Without the authorization of the King in Privy Council the Minister of the Interior was without authority to issue a Royal Patent Grant of Kioloku to Keohokalole and the absence of any mention of Kioloku in the records of the Privy Council is positive proof that no Royal Patent Grant was issued by the Minister of the Interior.

FOURTH: THERE IS NO MAHELE AWARD OF KIOLOKU

It has been seen that the Land Commission was established under the law of December 10, 1845, and commenced its operations on the 14th of February, 1846. It was to remain in existence for two years, but the Hawaiians, who seldom distinguished themselves for alacrity, had in many cases failed to present their claims to the Land Commission within the two years originally provided, and from time to time laws were enacted continuing the existence of the Land Commission until finally it went out of existence on the last day of March, 1855.

Although the Land Commission had been in existence, therefore, for some nine years, there were still several chiefs who had failed to present their claims to the Land Commission, and under the law, they were barred from any right to the land. To relieve the destitution of such chiefs who had been negligent, a law was enacted in 1860 called the "Konohikis Act" for the Relief of Certain Konohikis whose Names Appear in the Division of Lands from Kamehameha III, which law recited that

"Whereas certain konohikis who were entitled to lands under the Division of 1848 have for various reasons failed to obtain their awards from the Land Commission within the time specified by law, and for that reason are destitute. . . . "

Under this act the Minister of the Interior could grant an award (known as a Mahele Award) to those chiefs whose lands were maheled to them in 1848, but who had failed to receive an award of the Land Commission. Without the Mahele, therefore, there could be no Mahele Award. Nevertheless an examination of the patents issued by the Minister of the Interior fails to disclose any award of Kioloku to anyone, affording thereby, an additional reason for believing that there could have been no mahele of Kioloku to Ane Keohokalole, and therefore no mahele award.

The Konohikis Act provides that

“The Minister or his deputy shall cause a notice to be published continuously either in the native newspaper or in the “Polynesian,” calling upon all konohikis, their heirs, executors, or administrators, to present their claims on or before the last day of June, 1862, and if such persons shall fail to present their claims within said specified time, he shall be forever barred, and his right, under the Mahele Book, shall revert to the government.”

(Revised Laws of Hawaii, of 1905, page 1192.)

Again, on December 16, 1892, a law was enacted authorizing the Minister of the Interior to issue Royal Patents (Grants) for certain lands named in the Mahele of 1848 which may have reverted to the government under

the Act of August 24, 1860 (the Konohikis Act), and not disposed of by the government in the meantime. This act provided (Section 4) that

“This act shall remain in force until January 1, 1895, and any person having claims under this act who shall fail to present the same before said date shall be forever barred, and his rights under this act shall revert to the government.”

But again no steps were taken by the heirs or assigns of Kalakaua to settle the title of Kioloku under the act in question.

In 1892 the lands of Kioloku had become tremendously valuable, and it is certain that if there ever had been a mahele to Ana Keohokalole including Kioloku, the successors of Kalakaua would have taken advantage of the last named act and completed their title; but this was never done, and no mahele award was issued under the last named act.

FIFTH: IN THE VARIOUS ATTEMPTED TRANSFERS OF KIOLOKU BEGINNING WITH THE PARTITION DEED EXECUTED BY THE HEIRS OF ANE KEOHOKALOLE, AND IN WHICH THERE WAS AN ATTEMPT TO CONVEY TITLE TO KIOLOKU TO KALAKAUA, NO MENTION IS EVER MADE OF ANY MAHELE, LAND COMMISSION AWARD, OR ROYAL PATENT ISSUED ON AN AWARD OR ROYAL PATENT.

These conveyances are as follows:

The partition deed (Record 343 to 348 inclusive).

Deed of Kalakaua and wife, Kapiolani, to Obadiah Spencer, dated December 15, 1873, recorded in the Registry Office, Oahu, in Liber 38, page 438.

Deed of Obadiah Spencer to A. Hutchinson, dated May 12, 1874, recorded in Liber 39, page 323.

Deed, Executors of A. Hutchinson to Claus Spreckels and W. G. Irwin, trading together under the firm name of W. G. Irwin & Company, dated February 28, 1881, and recorded in Book 70, page 2.

Release of dower of Margaret A. Hutchinson, widow of A. Hutchinson, to Claus Spreckels, dated April 30, 1880.

Deed of Claus Spreckels and W. G. Irwin to Hutchinson Plantation Company, dated November 28, 1884, recorded in Liber 93, page 16.

Deed of Hutchinson Sugar Plantation Company to Louis Sloss, dated June 1, 1890, recorded in Liber 119, page 120; and

Deed of Louis Sloss to the Hutchinson Sugar Plantation Company, dated June 11, 1889, recorded in Liber 118, page 376. (Record 179 to 183.)

It will be seen that it was admitted by appellee that in all of these transactions, the land is simply mentioned by name with no derivative title.

Of course, it is not necessary to the validity of a deed that the derivation of title should be shown. Nevertheless,

we respectfully submit that a careful conveyancer drafting a deed affecting such a valuable piece of land as Kioloku would insert the number of the Land Commission Award and the number of the Royal Patent or Royal Patent Grant if any such existed, and the fact that no reference is made to the origin of the title would seem to furnish strong proof that it had no origin, or in other words, the title remained in the government.

SIXTH: THE FACT THAT NO MENTION IS MADE OF KIOLOKU IN THE DEED OF TRUST OF K. KAPAAKEA AND A. KEOHOKALOLE TO C. R. BISHOP, DATED JUNE 14, 1860, IS SOME EVIDENCE THAT ANE KEOHOKALOLE DID NOT HAVE TITLE TO THE LAND.

It may be noted here that no claim is made by the contestant to title originating in Kapaakea, the father of Kalakaua, and husband of Ane Keohokalole (Record 176), the claim being that the title originated with Ane Keohokalole, mother of Kalakaua.

It seems that in 1860 Kapaakea and Keohokalole were in financial difficulties and they made an assignment of all their property, real and personal, with the exception of their personal wardrobe, to C. R. Bishop, for the benefit of creditors (Record 337 to 342). This deed of trust makes no mention of Kioloku, and although it is equally true that it makes no mention of any other land either by name or particular description, yet the fact that Kioloku is not men-

tioned, it being a valuable Ahupuaa of land containing 835 acres, is some evidence that Keohokalole did not have title to the land.

SEVENTH: THE DECLARATION OF KALAKAUA AS TO THE LACK OF TITLE OF KIOLOKU CONTAINED IN HIS PETITION TO THE COMMISSIONER OF BOUNDARIES, JUNE 23, 1873.

Ane Keohokalole died April 6, 1867 (Record 169). The estate was administered upon and a partition deed executed between the heirs in 1870. Three years afterward, Kalakaua presented a petition to the Commissioner of Boundaries for the settlement of the boundaries of certain lands, including Kioloku. In his petition to the Commissioner of Boundaries he says:

"The undersigned states that A. Keohokalole had lands. She did not receive awards from the Land Commission to some of her lands, but she still holds said Ahupuaas to this time. Therefore, herewith apply to settle the boundaries of said lands according to the names herein-under, thus:" (Naming seven lands including the land of Kioloku, District of Kau, Island of Hawaii.)

Here is a distinct and definite statement on the part of the son of Ane Keohokalole that she did not have title to the land. This was a statement against his own interests made only six years after his mother's death, and doubtless made after energetic and fruitless search for the origin of this title.

We respectfully submit that the person most familiar with the title or lack of title in Kioloku was Kalakaua, and that when he makes the solemn admission that his mother had no title, that admission is entitled to the greatest weight.

THE PRESUMPTION OF A GRANT

It was admitted in oral argument by the contestant in the court below, that no statute of limitations runs against the Government, or as the maxim puts it,

“Nullum tempus occurrit regi,”

and it is therefore unnecessary to cite authorities in support of that doctrine.

“But,” says the contestant, “although time does not run against the government, yet, if we express our claim in different language, and say that from the lapse of time and other circumstances, a lost grant will be presumed, we obtain a different result; for by the use of this expression time *will* run against the government, as if no doctrine existed to the contrary.” So the contestant attempts to take the case out of the rule above referred to by stating that lapse of time *with other circumstances* will warrant the court in presuming a grant.

It was admitted by the Territory that the contestant had been in actual, open, notorious, adverse and exclusive use and occupation of the land in question since the partition deed between Kalakaua and his brother and sisters,

dated July 1, 1870, and that the lands have been used for the purposes for which they were suitable, to wit, the cultivation of cane and pasturage by the contestant and its predecessors in title since the last mentioned date. It was also admitted that the contestant and its predecessors in title have paid all taxes on the land. (Rec. 76-129.)

The "other circumstances" relied upon by the contestant are as follows:

(a) *The accounts of C. R. Bishop filed in Probate Record No. 1839, showing the receipt of rent from one Martin for the land of Kioloku from 1861 to 1868 inclusive.*

On June 14, 1860, Caesar Kapaakea and Ane Keohokalole conveyed all their real and personal property to C. R. Bishop as trustee, and in the accounts of Mr. Bishop, filed in the matter of the Estates of Kapaakea and Keohokalole, it appears that he had collected rent for the land of Kioloku (Rec. 171-175). There is nothing to show what land of Kioloku is meant. There is nothing in the accounts to indicate that Kioloku was on the Island of Hawaii. The Kioloku referred to may have been some other land, even on a different island. It is a well known fact that there are many places having the same name; for instance, there is a Waimea on Kauai, one on Oahu, one on Hawaii and probably one on Maui. But letting it be granted that the Kioloku referred to in the accounts is the Kioloku of this case, it will first be noticed that \$20 a year, the amount

of rent collected is but a small rent, even for those days, of a piece of land of about 850 acres, now valued at \$11,000. (Rec. 132.)

We have been able to find no inventory of the estate of Ane Keohokalole filed in the Probate Court, nor is there any reference from the beginning to the end of the record to this land, other than that contained in the Bishop account, and the references to the partition deed.

Again, the mere fact that one Martin paid rent for Kioloku does not warrant the presumption that either Kapaakea or Keohokalole claimed to own the land in fee. Ane Keohokalole may have received from the king and chiefs permission to use the land, and under this permission, may have rented the whole or part of the land to Martin. In fact many theories might be adopted to account for this payment of rent other than the theory that Ane Keohokalole has received a grant of the land. The petition of Kalakaua to the Boundary Commissioner, made shortly after the partition deed had been executed, in which the land of Kioloku is referred to as being held by Ane Keohokalole, but in which the definite statement is made that there had been no award of the land is far more eloquent on the question of a grant than is the account of Mr. C. R. Bishop, and we submit that the receipt of rent from Mr. Martin forms no basis for the presumption that a grant had issued, either to Kapaakea or Keohokalole.

(b) *The payment of taxes.*

The Territory admitted that the contestant and its predecessors in title had paid taxes on the property (Rec. 77). It is true that the payment of taxes is a factor which may be relied upon under a claim of adverse possession, but the payment of taxes alone does not constitute proof of adverse possession, nor does it, in this case, become proof that a grant had issued to Ane Keohokalole. Kalakaua knew that no grant had been issued. In other words, he knew that he had absolutely no title to the land. Having no title, he proceeded to fortify himself as best he could, and his successors followed suit. They knew that they had no title; they also knew that unless they paid the taxes on the land, it would very quickly be brought to the attention of the government that the land was producing no income to the government, and action would be taken to oust them. In the exercise of ordinary prudence, therefore, they would be ready and willing to include the land of Kio-loku in their assessment, expecting thereby to fortify their position.

It must be remembered that during these years, the government received no rent for the land, and no consideration had at any time been paid therefor. The contestant and its predecessors in title would have no right to complain because they had used the land without consideration other than the payment of taxes.

We respectfully submit that there is no foundation for

the presumption of a grant, raised by the fact of payment of taxes.

(c) *The description of the boundary of L. C. A. 9659 intimating that Kioloku is konohiki land.*

There was admitted in evidence, L. C. A. 9659 to Kekahuna, dated April 8, 1852 (Rec. 96-98). The purpose of this offer was thus explained by counsel for the contestant:

Mr. Robertson: "I am going to show, your Honor, the location of this land with reference to the land in dispute, and I am going to call your Honor's attention to the diagram in the award "konohiki," "konohiki," "konohiki," in other words, the diagram of the survey in the award shows this kuleana surrounded by konohiki land and not government land." (Rec. 97.)

At the date of this award the Land Commission was in session and it remained in session for nearly three years thereafter, to be exact, until March 31, 1855, when it was dissolved by law (*vide supra*). Now, as pointed out in the first part of this brief, prior to the awards of the Land Commission, all lands were the property of the king, and therefore anyone having charge of unawarded lands, had such charge under the king as his agent or *konohiki*.

Andrews thus defines the word "konohiki":

"The head man of an ahupuaa. A person who has

charge of a land, with others under him." (Andrews' Dictionary, page 294.)

Mr. Wright, a witness for the contestant, testified as follows on cross-examination:

By MR. LIGHTFOOT: Q. In your examination of Hawaiian surveys, Mr. Wright, you have stated on your direct examination that you have found the word "konohiki" to represent private ownership?

A. I did.

Q. Have you ever, in your examination of old surveys, found the word "konohiki" used as a boundary where the boundary was not on privately owned lands?

A. I have.

Q. On one occasion or on many occasions?

A. On many occasions.

Q. And referring both to crown lands and to government lands?

A. Yes, sir.

THE COURT: Q. That is, if a kuleana was situated within any crown lands or government lands, its boundaries would be designated as "konohiki"?

A. There are cases.

Q. There are cases?

A. There are cases.

MR. LIGHTFOOT: Q. Are you familiar with the Ahupuaa of Waiohinu?

A. I am.

Q. What is that?

A. Crown land.

Q. Crown land. Do you know if there are any surveys made of kuleanas within Waiohinu which give their boundaries on the Ahupuaa of Waiohinu as "konohiki"?

A. I do.

Q. Are there?

A. There are.

(Rec. 160-161.)

Mr. J. S. Emerson, a witness for the contestant, testified on cross-examination that the land in ancient times, in the way it was held by a person as the agent of another, was said to be konohiki land. (Rec. 142.)

"The land in ancient times, in the way it was held by a person as the agent of another, was said to be konohiki land." (Rec. 142.)

He also testified as follows:

Q. Yes. In a broad sense it may be said that all lands belonged to the king?

A. Yes.

Q. Really to the kings and chiefs—

A. Yes.

Q. —according to the constitution of 1840. Now the king didn't personally administer the individual lands?

A. Not at all.

Q. He had other people to care for them, did he not?

A. Yes.

Q. I am speaking of the time now before the Great Mahele.

A. Yes.

Q. What were those people called?

A. Konohiki.

Q. Konohiki; so that, before the Great Mahele, the custodian under the king of an ahupuaa was called a konohiki? (Rec. 142-143.)

A. Yes.

Mr. S. M. Kanakanui testified that there are many instances where the word "konohiki" is used as the boundary of a kuleana situate within government or crown lands. (Rec. 223.)

Mr. Walter E. Wall, Surveyor of the Territory, testified as follows:

Q. Now will you state what value is to be placed on the use of the word "konohiki" as a boundary as to a survey made in 1852?

A. The term "konohiki" might be applied in perhaps more than one way. In general, from a knowledge, a general knowledge of the use to which it has been put, I would be disposed to think that it was a convenient term used by surveyors, who were indifferent to an extent as to the actual ownership but realizing that it belonged to other parties—

Q. Other parties?

A. To other parties, and not knowing the owner in reality they would refer to it as "konohiki." For instance,

the konohiki of a land is the agent, the head of the ahupuaa, the agent in charge of the land. And a surveyor, it is enough for him to know that it was along someone else's land and in kuleanas, in particular, that was a very common reference, is found describing kuleanas and the various classes of land, crown land, lands of the chiefs and the lands of the government.

Q. Land of the government, you refer to?

A. I say it is very commonly used. It was a convenient term to apply as of belonging to someone other than the owner of the land being described.

Q. I didn't quite understand you. You mean he would use the term konohiki if the surrounding land belongs to the government the same as he would if it belonged to a private individual?

A. It is frequently used. It was used, for instance— Now let me see, if the term konohiki was used in a survey prior to the date of the division or Mahele, that might properly apply to a konohiki land or to the konohiki, the agent in charge of it.

Q. That would be prior to 1852, though, wouldn't it?

A. Now, then, if a surveyor—

Q. Referring to the time prior to 1852, you say?

A. Prior to 1848.

Q. Yes.

A. Prior to 1848. Now if a surveyor refers subsequently to that it depends on his knowledge as to the own-

ership. If he was a painstaking man who had full knowledge of the ownership, did it knowingly, why the konohiki would refer to the occupier or possessor of the land at the time.

Q. And would it mean private ownership?

A. Well, it might be a crown land or it might be one of the konohiki lands. By konohiki land I would mean a land that was in the possession of a high chief and continued in his possession until title was warranted.

(Rec. 194-195-196.)

And again Mr. Wall testified as follows:

MR. LIGHTFOOT: Q. And what was the custom as to the boundaries of those lands in those ancient surveys?

A. Well, my understanding of the matter is that, prior to the Mahele, the larger ahupuaas were very strictly konohiki lands. They were held by the higher chiefs under the king, who really owned or controlled all lands. The chiefs under him were the agents on the konohiki property, and under the descriptions—those smaller lands refer to them as abutting along konohiki. That's the way the term came to be applied.

The surveyor who used the term "konohiki" in the surveying of this kuleana, was not describing Kioloku; he was describing a kuleana within Kioloku; he was probably ignorant of the title of Kioloku. But, however this may be, title to the land cannot be established by a surveyor. In the case of *Rose v. Yoshimura*, 11 Haw. 31, the court said:

"Counsel for defendants concedes that were it not for the fact that defendants' survey is the earlier judgment should be entered therein for plaintiff on the strength of his prior award and patent, but contends that upon the completion of defendants' survey the title of the land in question vested in those under whom the defendants claim, and that therefore the award subsequently made to plaintiff's awardee is void and of no effect, so far as it purports to grant the land.

"The American decisions cited by defendants' counsel in support of this contention are based, some on treaties and the others on special statutes bearing on the subject, and consequently furnish no assistance in a determination of the present case. We have no such treaties or statutes.

"As I understand the history of land titles in this country, no such effect, as claimed, can be given to the mere survey of a piece of land. Our Supreme Court has held that neither the Mahele itself (6 Haw. 67) nor an application for an award (3 Haw. 635) gave any title, and that until an award was made by the Board of Land Commissioners, or by the Minister of the Interior (after 1860), the land must be considered to still belong to the government.

"In the 'Principles Adopted by the Board of

Commissioners,' etc., the only reference to surveys is the following: '7th. Connected with each claim for land is its configuration and superficial contents, without the ascertainment and demarkation of which it were impossible to make an award, or to quiet the title as between neighboring proprietors. The Board is therefore under the necessity of causing each piece of land to be surveyed, at the claimant's expense, before awarding it. This is clearly contemplated by the 12th section of the law, among the expenses incidental to the proposed investigation.'

"As I read this section, there was no intention on the part of either the commissioners or the legislature that the survey, without an award, should be binding either upon the government or the claimant; on the contrary, I think it clearly appears that the Board was to have the power to continue its investigation upon any claim even after the survey was complete, and thereafter to make its award as it saw fit. Nor is anything to the contrary to be found in said 'Principles' or in any other law or decision of ours."

We respectfully submit that the description and survey of Kuleana 9659 forms no basis for the presumption of a grant to Ane Keohokalole or to anyone else.

(d) *Boundary descriptions contained in R. P. Grant*

2656 to *Kaunumanu*, and R. P. Grant 2748 to *Kaleiku*. Also those of the *Ahupuaa of Honoapo* and the *Ahupuaa of Waiohinu*.

Among the "other circumstances" relied upon by the contestant to support the claim that a grant should be presumed, there was offered in evidence Royal Patent Grant 2656 to Kaunamanu (Rec. 98, 99, 100). In this grant the description reads, "Commencing at the north corner on the seashore and running *along the boundary of Kioloku* North 76° " There was also offered in evidence by the contestant Royal Patent 2748 to Kaleikau (Rec. 100 to 102). A part of the description of this land reads, "Thence along government land North $29\frac{3}{4}$ E. 13.0 chains to a stone wall on the *boundary of Kioloku*." There was also offered by contestant and received in evidence Certificate of Boundaries issued by the Boundary Commissioner on the Ahupuaa of Honuapo, being numbered 74. The sixteenth course in the description of boundaries reads, "South $40\frac{1}{4}^{\circ}$ E. 34.7 chains *along Kioloku* to + cut in the bedrock of stream at Kamaili"; and the twenty-third course reads, "South $70\frac{1}{2}^{\circ}$ East 45.57 chains *along Kioloku* to pile of stones (Rec. 107-108). There was also offered in evidence Boundary Certificate of Waiohinu, also an adjoining land, the thirty-fourth course of which reads, "Along Kaunamanu government land to a point from which the *West corner of Kioloku* land the letter "A" cut in bedrock at the

junction of two streams bears North 40 degrees East 11 chains, thence" (Rec. 110).

It was admitted in oral argument and in the briefs in the court below, that any one of these "other circumstances" taken alone does not afford a basis for the presumption of a grant the contention being made, however, that all these "other circumstances" being taken together constitute that basis.

We respectfully submit that the value of the boundaries above referred to as bases of the presumption is nothing, and the sum of several nothings is nothing. If land titles are to be presumed on the theory that the sum of several nothings amounts to something, the trial of titles would degenerate into a mere farce.

(e) *The proceedings before R. A. Lyman, Boundary Commissioner.*

Assignment No. 6.

Sixth: The said Supreme Court of the Territory of Hawaii erred in holding and deciding as follows:

"No living witness has been produced who was present at the proceedings before the Boundary Commissioner, and while the statement of Kalakaua in his petition was weighty evidence supporting the claim that no award of Kioloku had been issued to his mother, yet the proceedings had upon the petition before the Commissioner strongly refute that assumption."

It will be remembered that the Land Commission in the early part of its existence issued awards only after a survey describing the land awarded by metes and bounds. It was soon found, however, that it was a physical impossibility to procure surveys of all the lands awarded on account of the shortness of time and the absence of competent surveyors. Accordingly, on June 19, 1852, a law was passed empowering the board "to grant titles to konohikis for whole ahupuaas or ilis of land received by them from the king in the Division of 1848, awarding said lands by their proper names without survey." Many lands were thus awarded, but before a Royal Patent could issue on the awarded lands it was necessary to procure from the Commissioners of Boundaries appointed on the various islands, a certificate of the boundaries of the lands sought to be patented. The law creating the Commissioners of Boundaries was passed in August, 1862. Section 3 of this Act provides that

"All owners of ahupuaas and ilis of land within this kingdom whose lands have not been awarded by the Land Commissioners, patented or conveyed by deed from the king, by boundaries described in such award, patent or deed, are hereby required within four years from the passage of this act, to file with the commissioners of the district in which the land is situate, an application to have the boundaries of said land decided and certified to by

the commissioners. The application shall state the name of the land, the names of the adjoining lands, and the names of the owners of the same, where known, and it shall also contain a general description, by survey or otherwise, of the boundaries as claimed."

Section 4 of the Act provides that

"It shall be the duty of the Commissioners . . . to notify the owner or owners of the lands and also those of the lands adjoining of the time when they shall be prepared to hear their case."

To support the claim of the presumption of a grant, the contestant offered the following evidence relating to the proceeding before the Boundary Commissioner:

MR. ROBERTSON: Q. State whether you brought with you under subpoena, the record of the boundary commissioner for the Island of Hawaii?

A. Yes, sir.

Q. Volume A, No. 1?

A. Yes, sir.

Q. Will you please refer to page 399 of that volume?

A. Yes, sir, I have it .

Q. State whether or not on that page there is any record with reference to a proceeding to settle the boundaries of the Ahupuaa of Kioloku in the District of Kau.

A. Yes, sir, there is.

Q. Written in the English language, is it not,

A. Yes, sir.

MR. ROBERTSON: We offer this in evidence.

MR. LIGHTFOOT: We submit that, for the reason formerly urged, it is immaterial to this case what the boundaries of Kioloku are. They are admitted to be correctly described in the petition, and therefore any evidence of that would be cumulative. The boundary commissioners were not entitled, not authorized to settle it.

THE COURT: The Government was a party to these proceedings?

MR. ROBERTSON: We propose to show that the Government was represented at the proceeding, yes, your Honor.

MR. LIGHTFOOT: I wish to state that the Government was not a party. The Government was not a party to these proceedings. It is true there was a Government—the record shows there was a Government representative of some kind present at the hearing before Judge Lyman, who was commissioner, but the Government was not represented.

(Argument.)

THE COURT: I will admit the document. I want everything before me that can possibly have any bearing upon the matter.

MR. ROBERTSON: Have you any objection to my reading this?

MR. LIGHTFOOT: No.

MR. ROBERTSON: Reads as follows: at the head of the page, "The Ahupuaa of Kioloku, District of Kau, Island of Hawaii, Third J. C.," which we claim means Judicial Circuit, "On this, the 14th day of October, A.D. 1873, the Commission of Boundaries for the Island of Hawaii, Third J.C., met at Waiohinu, Kau, on the application of D. Kalakaua, for the hearing of testimony for the boundaries of Kioloku, situated in the District of Kau, in said Island of Hawaii."

THE COURT: Why, that was to fix the boundaries of the land in question, then?

MR. ROBERTSON: Yes, your honor. You see I am not reading now— This proceeding here was in October, 1873; this was subsequent to the partition deed of the heirs of Keohokalole whereby Kalakaua was assigned, in the partition between the family, to this land of Kioloku. He then, in 1873, brought this proceeding for the settlement of the boundaries. It was a land that was awarded, like so many others were, by name, and that is what the boundary commissioners were established by law for, was to settle the boundaries of lands that had been awarded by name only, and in that proceeding, according to the regular procedure, notice of the proceeding was given to adjoining owners, and they were entitled to be heard, not on the question of the title but upon the boundaries of the land. Now then, we will show that the boundaries on the west side, the boundary, the land on the west side of Kioloku

was a Government land, hence the Government was directly interested in the settlement of the boundaries of Kioloku because it was an adjoining land, and that fully accounts for the Government being represented at the proceeding.

(Continues reading): "Due notice personally served on owners or agents of adjoining lands as far as known. President J. G. Hoapili for the applicant and his Majesty, W. T. Martin for the Hawaiian government." Then follows the testimony of witnesses which I will not take time to read unless counsel wants it. There was a continuance until the 15th. continuance on account of the illness of a witness, until the 15th of October, 1873, and then the—I will read again: "Boundary Commission met at Poohina on October 15th, at the house of the witness Pae, according to adjournment from the 14th inst. Present J. G. Hoapili and J. Kauhane." At the end of the testimony there was this entry: "Testimony closed. Decision, boundaries to be as given in evidence of the witnesses of this land and Honuapo, and Royal Patents of adjoining lands. Survey ordered. Notes of survey to be filed previous to certificate of boundaries being issued. R. A. Lyman, Commissioner of Boundaries, Third J. C."

We offer that in evidence.

MR. LIGHTFOOT: Wouldn't it be well to stipulate that in the evidence there is no record of any testimony being given as to the ownership of the title of Kioloku? It is ambiguous as it is there.

MR. ROBERTSON: I will admit that. That proceeding is not a trial of title; it is a settlement of boundaries. I will admit that no reference was made, with this qualification, Mr. Lightfoot, that Kalakaua was claiming—

MR. LIGHTFOOT: Yes, yes.

(Testimony of Henry Peters.)

MR. ROBERTSON: With that understanding that the proceeding was instituted by Kalakaua, claiming to be the owner, there is no other reference to the title of the land, the title not being at issue in that proceeding.

Kalakaua, as it has been seen, presented his petition for a certificate of title of the boundaries of Kioloku and likewise the boundaries of several other lands stating, however, in his petition that although his mother, Ane Keohokalole, had held the lands, she had not received an award for them. When the petition of Kalakaua was discovered by the government a motion was made to reopen the case so that the same might be admitted. The motion was granted (Rec. 23 to 28), and thereupon a stipulation as to agreed facts was entered into by counsel for the respective parties (Rec. 29 to 31). In the stipulation it was agreed that no hearing had been had before the Boundary Commissioners on any of the lands named in the petition of Kalakaua other than Kioloku.

The first land, Lililoa, Puna, Hawaii, was sold by the government in 1896 to John T. Baker, being Grant No. 3954. A portion of the second land, Nalua, Kau, Hawaii,

was sold by the government by grant 2118. The remainder was homesteaded by the government in 1913. The third land, Kamakamaka, Kau, Hawaii, is unknown, there being no map or survey by which it can be identified. A portion of the fourth land, Kapaukau, Kau, Hawaii, containing $205\frac{1}{2}$ acres, was sold by the government by Grant 2653. Other portions were homesteaded in 1913. The fifth land, Mohakea, Kau, Hawaii, was the property of Princess Ruth. The sixth land, Ilikahi, Kau, Hawaii, was sold by the government in several parcels to various parties in 1852 and 1853 by grants numbered 866, 927, 1145, 1174, and 1175. It was also admitted that no Land Commission Award covered any of the lands could be found in the records of the Land Commission or other public records. (Rec. 29 to 31).

The fact that one "Martin" was present before the Boundary Commissioner, also, it seems to us, has no weight. Who was Martin? Was he the gentleman paying rent for Kioloku? That is the only mention of any Martin in the case. There is nothing to show what office Martin held, or that he had power to bind the government by his presence before the Boundary Commissioner. Kalakaua doubtless thought that, owing to the absence of title, he would get a certificate of boundaries, which might be made the substitute for a Royal Patent in some subsequent proceedings, and to lend extra solemnity to the occasion, he might have secured the presence of Mr. Martin, represent-

ing the government, who, for aught we may know to the contrary, may have been poundmaster. There was no power in Mr. Martin to bind the government, and the fact of his presence before the Commissioner of Boundaries cannot be made the basis of any presumption of a grant.

The Boundary Commissioner was not a court of record. His duties were to determine boundaries. He had nothing whatever to do with the title. The proceedings before the Boundary Commissioner were similar to those before the District Magistrate under the Landlord and Tenant Act.

In re Boundaries of Paunau, 24 Haw. 546. The records of the Boundary Commissioner do not import absolute verity and there is no proof that the Hawaiian government was given notice of the petition of Kalakaua, or took any part in the proceedings. The Commission of Boundaries was required to give notice to the owners of adjoining lands. He was not required to give notice to the government that the petition of Kalakaua had been filed, and that he claimed to own the ahupuaa. Indeed, for aught that appears to the contrary, the officers of the government, whose business it was to attend to the public lands were blissfully ignorant of the whole proposition.

Land titles in Hawaii do not depend upon such slender threads. There were certain methods laid down by law for acquiring government lands. These methods were exclusive and cannot be added to at the present day. We can see

nothing in the proceedings had before the Boundary Commissioner, especially after reading the decision in the Pau-nau case, which affords any basis for the presumption that a grant of Kioloku was issued to Ane Keohokalole.

(f) *The letter of Professor Alexander to the Minister of the Interior containing a list of unassigned lands in which is not included the Ahupuaa of Kioloku.*

As an "additional circumstance" of contestant's theory of the presumption of a grant, there was offered and received in evidence a letter written by W. D. Alexander, then Surveyor-General of the Kingdom, to the Minister of the Interior, dated June 15, 1888, containing a list of unassigned lands, in which the Ahupuaa of Kioloku is not included (Rec. 319 to 333). If Professor Alexander were able to speak from the grave, he would undoubtedly admit that at no time during his long life did he know all about every land in the Hawaiian Islands. His knowledge of the unassigned lands of Hawaii was doubtless acquired by degrees. When he wrote to the Minister of the Interior, he was evidently not aware that Kioloku existed. He subsequently became aware of that fact, however, as shown at least by his writing on the map (Respondent's Exhibit "10," Rec. 335) the words "no title," which words were identified by the Territorial Surveyor Walter E. Wall, as being the writing of Professor Alexander (Rec. 185). We consider it a great misfortune that we were not allowed to show that at a later date Professor Alexander did become aware of

the existence of Kioloku, and classified it as unassigned land (Petitioner's Exhibit "E" for Identification, Rec. 303 to 314), but as far as the evidence goes the letter to the Minister of the Interior merely indicates that on January 9, 1888, the professor did not have information about Kioloku, and we are unable to see how this lack of knowledge can form any basis for a presumption of a grant to Ane Keohokalole.

(g) *The attitude of past governments of these islands with respect to the land in question.*

In the year following the deed of Kalakaua and his wife to Spencer, Kalakaua became king, and reigned until 1891. The Attorney General, during his reign was appointed by him and held office at his pleasure. That may account for the fact that no attorney general, during the reign of Kalakaua, had the temerity to attack the monarch's deed.

Liliuokalani succeeded Kalakaua, and reigned until 1893. It will be remembered that she was a party to the partition deed in 1870. It may be that this was a prime factor in the negligence of the attorney general to enforce this claim. During the troublous times between the dethronement of her Majesty Liliuokalani and the cession of the islands to the United States, there were very frequent changes of administration. From 1870 to 1913, when this petition was filed, there were forty-one attorneys general in office (see Thayer's Digest, pages XV and XVI). From 1870 to annexation, there were nineteen

Ministers of the Interior. During the provisional government of the Republic of Hawaii there was one Minister of the Interior. These frequent cabinet changes afford the most potent reason for the maxim,

“Nullum tempus occurrit regi.”

We respectfully submit that the “additional circumstances” relied upon by the contestant as above set forth and upon which His Honor the Trial Judge, and the Supreme Court of the Territory of Hawaii based the presumption of a grant affords no basis of any such presumption, but that on the other hand, all the facts and circumstances of this case lead irresistibly to the conclusion that there was no mahele, no award, no royal patent and no royal patent grant of Kioloku to Keohokalole or to anyone else.

THE LAW RELATING TO PRESUMPTIONS OF A GRANT.

His Honor, the Trial Judge, in deciding that the doctrine of the presumption of a grant may appropriately be invoked in this case, cites among others the following (Rec. 46):

1 *Greenleaf Sec.* 17, 32, 45.

State v. Wright, 41 N.J. L. 478;

Carter v. Fishing Co., 77 Pa., 310;

Williams v. Mitchell, 112 Mo. 300, 312, 314;

Grimes v. Bastrop, 26 Tex. 310-315.

Caruth v. Gillespie, 68 So., 927, 929;

Carter v. Walker, 65 So., 120;

U. S. v. Chaves, 159 U. S. 452, 464;

S. U. v. Chavez, 175 U.S. 509, 518;

State v. Wright, 41 N. J. L. 478.

In this case the court says:

“Under the English cases a presumption sometimes arises to establish a claim, even against the sovereign notwithstanding the maxim, ‘Nullum tempus regi,’

and many English authorities are cited in support of the doctrine. We do not deny that in England a grant may be presumed against the sovereign. We do deny that a grant can ever be presumed against the Territory. The subject will be discussed more fully hereafter.

Carter v. Tinicum Fishing Co., 77 Pa. 310-315.

This was an action filed in 1867 and involved the title to an incorporeal hereditament, to-wit, a fishery. The plaintiff claimed under an ancestor who had title to the fishery in 1748, but he was unable to connect the links in his chain of title. It was held by the court that

“Presumption arising from great lapse of time and non-claim are *sources of evidence* which a court is bound to submit to a jury, as the foundation of title by conveyances long since lost or destroyed. Acts of ownership over incorporeal hereditaments

corresponding to the possession of a corporeal, are deemed a foundation for a presumption."

Williams v. Mitchell, 112 Mo., 311.

In this case there was involved the presumption of the execution of a deed. The probate court had ordered the deed executed, and the grantee had remained for many years in possession of the property without claim by the grantor or his successors. It was held that it will be presumed that a deed was executed in compliance with the order of the probate court. This doctrine was repudiated by the Supreme Court of the Territory in the Lewers and Cooke case, 18 Haw. 625.

Grimes v. Bastrop, 26 Texas, 310-315.

This was an action brought against the appellant for the recovery of damages incurred by the cutting and carrying away of pine timber from the town tract. The boundaries of the tract were questioned. The title of the township was defective and it relied upon the presumption of a grant. The court said:

"The doctrine of presumed grants has on several occasions been discussed in this court, and it must now be admitted as fully established on principles that cannot be controverted, that, *under proper circumstances*, a grant of land from the state may be presumed. But what facts are sufficient to

authorize the presumption, or for what length of time they must have occurred, has not yet been authoritatively determined. It may be, perhaps, that there is no general rule applicable to the subject, and that each case, as it arises, must depend upon its own peculiar circumstances. This would seem more probable if the presumption is one not of law, but as it is generally said, of facts to be drawn by the jury from the evidence. *Certainly no one who will give the subject a moment's reflection but must conclude that a very different state of facts should authorize the presumption of conveyances by a private person from those which will justify a presumption of a grant from the state.* And here again it should be much more readily presumed when all the facts are shown to exist which entitled the party to the grant and the fact sought to be presumed is a mere ministerial act to evidence a pre-existing and established right, than when the presumption is asked to be made from the mere fact of continued possession, if in many cases, it can arise from this fact alone."

The court instructed the jury that they might presume a grant from the continuous claim of the land by appellee. This was held to be error, and the case was reversed.

Caruth v. Gillespie, 68 So., 928.

This was a suit in equity by appellant to confirm his title in certain lands. The appellee relied upon a deed dated March, 1884, which had been destroyed by a fire which destroyed the courthouse and all the public records of the county in 1882. It was held under the circumstances a lost deed would be presumed.

Carter v. Walker, 65 So. 170.

In this action the plaintiff sued on account of personal injury caused by a wire which defendant had stretched across a certain alleged public highway. The presumption of a grant from the United States from adverse, exclusive and uninterrupted possession for twenty years was applied as a *presumptio juris et de jure*, the case following the doctrine laid down in *United States v. Chavez*, 175 U.S. 509. The court instructed the jury that the public use for the prescriptive period of the roadway in question was no evidence of public right, and hence that the roadway was not a public highway, and in accordance with this fact, instructed them to find for the defendant. It was held that this instruction was erroneous, as the case should have been referred to a jury.

United States v. Chaves, 159 U. S. 452, and

United States v. Chavez, 175 U. S. 509.

These cases were tried on appeal from the Court of

Private Land Claims, and involved the presumption of a grant from the Mexican government. This fact must be borne in mind when reading the case, for if it be borne in mind, it will be seen that the citations relied upon by the contestant in the case at bar are simply *obiter dicta*.

In *U.S. v. Chaves*, 159 U.S. 452, the claim was based upon an award granted to Juan Chaves in 1833, or sixty-two years before the case was decided. It was alleged that this grant had been lost or destroyed, at any rate it could not then be produced. Evidence was adduced in the Court of Private Land Claims from which the Supreme Court of the United States concluded that the complainant's title was derived from the Republic of Mexico, and was complete and perfect at the date when the United States acquired sovereignty in the territory of New Mexico, within which the land was situated. This evidence was as follows:

Benito Baca had lived on the land in question and under the governor making the lost grant. He enumerated by name the colonists to whom the grant was made, and stated that there was in their possession a written grant from the governor which he had heard read and had seen; that this writing which was in the custody of Juan Chaves could not be found after the death of the latter.

Jose Antonio Duran testified that he was one of the settlers under the grant; that their title was

a written title, made to them by the governor. He gave a description of the boundaries of the land and the names of some of the original settlers of 1833. He had seen and read the written title from the governor; that when Juan Chaves died, the grant was lost, and that it was currently reported that a person who had been the secretary of Chaves had carried off the documents. He further testified that when they applied for the grant, an Indian named Baca was on the land, and that the grant was made on the condition that the Indian would abandon it. Joe testified that he had heard the original grant read. The papers were in the possession and read by Juan Garcia and one Juan Chaves. He also testified that the papers had been stolen or carried away by the secretary of Chaves; that he had seen the original testimonio of the grant, and had heard it read.

A number of original deeds were likewise in evidence, dated from 1841 to 1856, showing the sales of parcels of these lands; also a petition of the people of the town of Cubero to the surveyor general of the Territory of New Mexico dated April 2, 1856, stating that they were in possession under the authority of a grant from the Mexican government about the year 1834, and that the original documents had been lost.

It was also proven by quite a number of witnesses that about 1870 a considerable portion of the archives of that territory containing documents relating to Mexican grants were lost; that these papers had been deposited in the territorial library, where some of the witnesses had seen them in 1868 and 1869; that they were sold as waste paper by the librarian Bond, and were scattered through the country. Many of these were Spanish documents, and pertained to grants of land. When the governor of the territory heard there was a complaint made by the people of this treatment of the public archives, he made efforts to get them returned, but the evidence is clear that many of them were destroyed or lost.

William M. Tipton testified that he had been employed for several years in the office of the surveyor general of the territory of New Mexico, and had charge of the Mexican archives; that the books and records in that office purporting to contain the registry of land grants made by the Spanish and Mexican governments, prior to the time the government of the United States took charge, are in a disconnected, fragmentary form, and that there are no indexes of the grants. There was evidence that the governor and the chief alcalde had delivered to the settlers a duplicate of the granting decree,

which papers had been negligently destroyed or lost.

The only evidence adduced on the part of the United States was that of Ira M. Bond, who testified that under the instructions of Governor Pile, he had sold and disposed of a lot of the old records, supposing them to be of no value; that this created quite a lot of talk in the town, and finally the governor instructed him to recover them back, and that most, but not all, of them were recovered. This witness stated that he could not read Spanish, that the documents were in that language, and that there might have been grants among them.

The Supreme Court finds as follows:

“In view of this large body of uncontradicted evidence, we think that the court below was plainly right in finding that the claimants had satisfactorily sustained the allegations of their petition. Not only was there evidence of the existence of an original grant by the government of New Mexico, and the loss of original records sufficient to justify the introduction of secondary evidence, but there is the weighty fact that for nearly sixty years the claimants and their ancestors have been in the undisputed possession and enjoyment of this tract of land. The counsel for the government, indeed, contend that the court of private land claims and

this court have no power to presume a grant upon proof of long-continued possession only; that their power is confined to confirming grants lawfully and regularly derived from Spain and Mexico.

“It is scarcely necessary for us to consider such a question because, as we have seen, there is ample evidence from which to find that these settlers were put in juridical possession under a grant from the governor of New Mexico, who, under the laws then in force, had authority to make the grant. However, we do not wish to be understood as undervaluing the fact of a possession so long and uninterrupted as disclosed in this case. Without going at length into the subject, it may be safely said that by the weight of authority as well as the preponderance of opinion, it is the general rule of American law, that a grant will be presumed upon proof of an adverse, exclusive and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et de jure*, wherever, by possibility, a right may be acquired in any manner known to the law (1 Greenl. Ev. 12th edition, p. 17. Ricard v. Williams, 20 U.S. 7, Wheat. 109; Coolidge v. Learned, 8 Pick. 504).

“Nothing, it is true, can be claimed by the prescription which owes its origin to, and can only be had by, matter of record; but lapse of time, accom-

panied by acts done or other circumstances, may warrant the jury in presuming a grant or title by record. Thus also, though lapse of time does not, of itself, furnish a conclusive bar to the title of the sovereign, agreeably to the maxim, 'nullum tempus occurrit regi'; yet if the adverse claim could have a legal commencement, juries are advised or instructed to presume such commencement, after many years of uninterrupted possession or enjoyment. Accordingly, royal grants have been thus found by the jury, after an indefinitely long-continued, peaceful enjoyment, accompanied by the usual acts of ownership. 1 Greenl. Ev. p. 45.

The principle upon which this doctrine rests is one of general jurisprudence, and is recognized in the Roman law and the codes founded thereon, and was thereafter a feature of the Mexican law at the time of the cession."

It will thus be seen that the expressions of the court relied upon by the contestant in this case, were *obiter dicta* as to the general law.

In the case of *United States v. Chaves*, 175 U.S. 509, 44 Law. Ed. 255, the original grant was produced from the Spanish archives, and no question arose as to the regularity of its issuance. The claimants, however, were unable

to present direct conveyances from the original grantor or from his heirs with which they were in any way connected. The petitioner showed a continuous possession from some time prior to 1785; inferentially from 1716, and it was held that the lost deed would be presumed.

We wish to call the court's attention to another Chavez case, to wit, *Chavez v. United States*, 175 U. S. 550, 44 Law. E. 269. The petitioner in this case relied upon a grant of the department assembly or territorial deputation of New Mexico of 1831. This department assembly had no authority to make the grant. It was held that the lapse of time between the alleged grant, i.e., in 1831, to the treaty of Guadalupe Hidalgo, i.e., 1846, was not sufficient to establish his legal grant by reason of the long-continued possession of the petitioner, the court especially refusing to take into consideration the time which had elapsed between the treaty of Guadalupe Hidalgo and the decision of the case, which was in 1899, as a basis for the presumption of a grant, the court saying:

"We do not deny the right or the duty of a court to presume its existence (i.e., the existence of a grant) in a proper case, in order to quiet a title and to give to long-continued possession the quality of a rightful possession under a legal right. We recognize and enforce such rule in the case of *United States v. Chaves*, decided at this term, 175 U.S. 509. We simply say in this case that the possession was

not of a duration long enough to justify any such inference. . . . The possession subsequently existing, (i.e., since the treaty of Guadalupe Hidalgo) we cannot notice."

In the case of *Fletcher v. Fuller*, 120 U. S. 534, the Supreme Court of the United States mentions with approval the instructions given to the jury, which are in part as follows:

"But, gentlemen, you are to look into the evidence upon this question of a grant; and if the evidence in favor of the presumption is overcome by the evidence against such a grant, then, of course, you will not presume one. It is a question of testimony."

That the presumption of a lost deed or grant is a rebuttable one is recognized in the following cases cited by counsel for contestant:

Carter v. Tinicum Fishing Co., 77 Pa., 310;

Reed v. Earnhart, 32 N. C. 516;

McGrath v. Norcross, 78 N. J. E. 120;

Grimes v. Bastrop, 26 Tex., 310, 315;

Williams v. Mitchell, 112 Mo., 300, 311;

Carter v. Walker, 65 So., (Ala.) 170;

Caruth v. Gillespie, 68 So., 927, 929;

Hewling v. Blake, 70 So., 247, 248;

Fletcher v. Fuller, 120 U. S. 534.

In the case of *Kapuni v. Kekupu*, 3 Haw. 560, the court said:

“When a lost deed, unrecorded, is set up for basis of title it is necessary that there should be presented clear proof of the execution of the deed and proof of its contents sufficient to enable the court to determine the character of the instrument.”

To conclude this portion of the argument, we contend that the authorities cited by the contestant do not show that the presumption of a Land Commission Award should be entertained by the court in this case. It should be noticed in passing, that no such conditions exist in the Territory of Hawaii as exist in New Mexico, relative to the destruction of government archives. Our records are complete, and there has never been any destruction of public documents in the Hawaiian Islands, similar to that in New Mexico.

THE DOCTRINE OF THE PRESUMPTION OF A LOST GRANT IS NOT APPLICABLE AS AGAINST THE TERRITORY.

Assignment of Error No. 5.

Fifth. That said Supreme Court of the Territory of Hawaii erred in holding and deciding that the doctrine of the common-law presumption of a lost grant may be invoked in favor of the state as well as against it.

The contestant admitted during the trial of the case

that adverse possession did not run against the government and based its claim upon the presumption of a grant.

We submit, however, that the doctrine of the presumption of a grant does not apply as against the Territory, and in support of this contention we wish to call the court's special attention to the case of *Kahoomana v. The Minister of the Interior*, 3 Haw. 635. The syllabus is as follows:

"The statute of limitations of real actions does not run against the government. Twenty years possession of land, for which no award of the Land Commission has issued, affords no presumption of a grant."

The whole case was tried on the theory that previous to 1829, Manuia and his wife Kaupena came to Hawaii and resided on the land in question (the site of the present Judiciary Building), and that her possession and that of her ancestors had been continuous, notorious, peaceful and undisturbed from 1829 to 1872, and therefore, she had acquired a title to these premises as against the government and as against third parties, evidently relying upon the presumption of a lost grant.

The court said:

"The theory of titles by prescription is, that the holding possession of an estate openly and adversely for a certain length of time, creates an inference that there was a grant from the adverse claimant or his

ancestors or grantors, and the statute of limitations forbids the adverse claimants from setting up against this long continued possession, the fact that there was no grant.

“But *as against the government a grant cannot be presumed* or inferred from long possession, in view of the law which required claimants to land to present their claims to the Land Commission for confirmation or rejection.”

This case settled the doctrine once and for all in this Territory. It has never been reversed, and has been cited with approval in many cases, including

Minister of the Interior v. Parke, Administrator, 4 Haw. 369;

Estate of Kekauluohi, 6 Haw. 172;

Thurston v. Bishop, 7 Haw. 421;

Rose v. Yoshimura, 11 Haw. 30;

Galt v. Waianuhe, 11 Haw. 652;

Atcherley v. Lewers and Cooke, 18 Haw. 625;

Territory v. Puahi, 18 Haw. 649.

Whatever the law may be elsewhere, in the Territory of Hawaii, no presumption of a lost grant can be entertained against the government.

Assignment of Error Nos. 1, 2, 3, and 4.

First. That the said Supreme Court of the Territory of Hawaii erred in rendering, entering and filing its decision

affirming the decree of the Land Court of the Territory of Hawaii, which said decision of said Supreme Court of the Territory of Hawaii was filed in said cause on the 15th day of March, 1920, and which said decree of the said Land Court was entered and filed on the 4th day of February, 1919.

Second. The said Supreme Court of the Territory of Hawaii erred in rendering and filing judgment affirming the decree of the Land Court of the Territory of Hawaii, which said judgment of said Supreme Court of the Territory of Hawaii was filed in said cause on the 18th day of February, 1919.

Third. The Supreme Court of the Territory of Hawaii erred in not reversing the decree of said Land Court of the Territory of Hawaii, which said decree was entered and filed in said Land Court on the 4th day of February, 1919.

Fourth. That the said Supreme Court of the Territory of Hawaii erred in not holding and in not entering judgment in said cause in favor of said appellant and against the Hutchinson Sugar Plantation Company, Limited.

In case the Court shall find that under the law and the evidence in this case, no award, patent or grant of Kioloku has been issued by the government, and that none will be presumed, it must follow that the rulings of the Supreme Court of the Territory referred to in these assignments, should be reversed.

Dated Honolulu, T.H., December 24, 1920.

Respectfully submitted,

HARRY IRWIN,
Attorney General of the Territory of Hawaii.

J. LIGHTFOOT,
Deputy Attorney General.



United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN THE MATTER OF THE PETITION OF THE TERRITORY OF HAWAII TO REGISTER AND CONFIRM ITS TITLE TO THE AHUPUAA OF KIOLOKU, IN THE DISTRICT OF KAU, ISLAND AND COUNTY OF HAWAII, TERRITORY OF HAWAII.

THE TERRITORY OF HAWAII, APPELLANT,

vs.

HUTCHINSON SUGAR PLANTATION
COMPANY, APPELLEE.

BRIEF OF HUTCHINSON SUGAR PLANTATION
COMPANY, APPELLEE

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Filed this — day of ———, 1921.

F. D. MONCKTON, *Clerk.*

By ———, *Deputy Clerk.*



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No. 3588

United States Circuit Court of Appeals

FOR THE
NINTH CIRCUIT

IN THE MATTER OF THE PETITION OF THE TERRITORY OF HAWAII TO REGISTER AND CONFIRM ITS TITLE TO THE AHUPUAA OF KIOLOKU, IN THE DISTRICT OF KAU, ISLAND AND COUNTY OF HAWAII, TERRITORY OF HAWAII.

THE TERRITORY OF HAWAII, APPELLANT,

vs.

HUTCHINSON SUGAR PLANTATION
COMPANY, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY
OF HAWAII.

BRIEF OF HUTCHINSON SUGAR PLANTATION
COMPANY, APPELLEE

STATEMENT OF THE CASE.

On the 2d day of August, 1913, the Territory of Hawaii filed its petition in the Land Court of Hawaii for the purpose of having its alleged title in and

to the Ahupuaa of Kioloku, District of Kau, Island of Hawaii, registered (Transcript of Record, p. 15). The only opposing claim filed was that of the Hutchinson Sugar Plantation Company, now appellee, which denied the alleged title of the Territory and asserted ownership of the land in fee simple in itself (Transcript, p. 21). The Government showed no disposition to press its claim and nothing further was done in the case until some time in October, 1918, when a motion was filed asking the court to set a day for the hearing of the case. The hearing was commenced on October 21st, 1918 (Transcript, p. 60).

The Territory claimed title to the Ahupuaa in question as an "unassigned" land; that is to say, a land which is not mentioned in the record of the Great Mahele of 1848, in and by which all the large lands of the Hawaiian Kingdom were intended or supposed to have been assigned and set apart in severalty to and between the King, the chiefs, and the Government, respectively, though, in fact many were omitted or not mentioned. The contention of the Territory was and is that all tracts of land not expressly listed as having been so set apart to a chief and/or subsequently awarded by an award of the Land Commission in the exercise of its functions under the statute of 1845, or conveyed by government grant or patent, became or remained the property of the Government.

The claimant, Hutchinson Sugar Plantation Company, asserted title in fee simple under a Land Commission award which, under the circumstances shown to have existed, must be presumed to have been made to the High Chiefess Ane Keohokalole. The common-law presumption of a transfer of title upon proof by secondary evidence was relied on.

The evidence for the Government on its case in chief consisted of the testimony of one S. M. Kananui, who had been for about thirty years in the service of the Bureau of Government Survey (Tr., p. 78). He testified to having searched the records of the Land Commission and the Privy Council of the former Kingdom without finding any record of or reference to the land of Kioloku. He found records of a Mahele and Land Commission awards of other lands to Ane Keohokalole, and to her husband, the Chief C. Kapaakea, but none of the land in question (Tr., pp. 78-83). He also testified that the Ahupuaa of Kioloku was not mentioned in the Mahele records, and, later, a record showing a Mahele to Keohokalole was introduced (Exhibit F, Tr., pp. 315-318), but therein the land of Kioloku was not enumerated. The witness testified to having made a very careful search of the records of the Privy Council. But those records are of secondary importance compared with those of the Land Commission, for it would be in the latter and not the former

that the evidence of an award would naturally be found. The Hawaiian Privy Council did not and had no power to award titles. The witness further testified that he searched for, without finding, a royal patent or grant or Government deed covering this land. The search made by the witness of the records of the Land Commission was not "page by page," as in the case of the Privy Council records, and the witness admitted that in making the search he was working on Government titles generally and not looking for Kioloku specially (Tr., pp. 87-89). Mr. Kanakanni explained that over eleven thousand awards were issued by the Land Commission, and that one award may cover as many as fifty separate pieces of land; that since in some cases no award was issued on a claim some numbers are missing from, or were not included in, the numerical list of awards; that in some cases the numbers were changed and others substituted, and that there may be extant numbered awards of which there is no present record (Tr., pp. 89-91). Reference to the "Kuleana Book," an official publication of which the Hawaiian courts and presumably this Court will take judicial notice, shows that (to add to the difficulty) the Land Commission in many instances used letters of the alphabet to distinguish awards having the same numerical designation. For instance, in the district of Kau, Island of Hawaii, L. C. A. 8559 was

issued to Lunalilo for a parcel of land at Honuapo; L. C. A. 8559B was issued to Lunalilo for several Ahupuaas. We find no L. C. A. 8559A nor L. C. A. 8559C. Can any one say none such were ever issued? L. C. A. 8559C may have been issued to Keohokalole for the Ahupuaa of Kioloku. We find in the same district L. C. A. 8760, 8760C, 8760D, 8760E, and 8760H. Where are 8760B, 8760G, and 8760I? We find L. C. A. 7606B, 7606C, and 7606D. Where is 7606E? Even double letters of the alphabet were used. For example, in the district of Kona, there is L. C. A. 5561BB, and in Hamakuapoko, Maui, we find L. C. A. 6510TT. There are many others.

Under these circumstances the most that Mr. Kanakanui or any other searcher could say is that he has been unable to find an award of the Ahupuaa of Kioloku. No truthful witness could ever say that the Land Commission never issued an award upon that land. There remains the possibility, therefore, that evidence of an award of Kioloku to Keohokalole actually exists in the records of the Land Commission. (See decision of Land Court, Tr., p. 34.)

The Land Court, however, seemed to regard that testimony as constituting a *prima facie* showing that Kioloku was an "unassigned" land (Tr., pp. 92, 93). The duty to go forward with the evidence therefore passed to the claimant, and the burden was fully discharged by a strong showing of facts, circumstances

and events the sum total of which could be accounted for and explained only on one reasonable theory, and that was that the land had been in fact awarded to Ane Keohokalole by the Land Commission, though record evidence thereof cannot now be produced. The case was tried upon the theory that no record or original evidence of an award or other title from the Government can now be found.

The case for the claimant consisted partly of facts admitted by the Territory and partly of evidence which was practically undisputed. The claim asserted rested upon the long-continued and uninterrupted possession of the land, accompanied by the usual acts of ownership, of the Hutchinson Sugar Plantation Company and its predecessors in title and occupancy, plus the assessment and payment of government taxes by the respective occupants, supplemented and reinforced by a chain of circumstances which pointed unerringly to the fact of private ownership of the land which must have had its source in an award of the title by the Land Commission before it finished its labors in 1855.

Judge De Bolt, of the Land Court, in a lucid and illuminating decision sustained the contentions of the claimant (now appellee) all along the line and denied the petition on the ground that the Territory had not shown title.

The Territory had the option to take an appeal to

the Circuit Court with a jury on the theory that there were disputed facts involved, or to carry the case to the Supreme Court upon points of law on a writ of error. Act 48, S. L. 1919. It chose the latter course. The decree of the Land Court was affirmed.

In the Supreme Court any disputed facts were, of course, resolved in favor of the decree of the Land Court and against the plaintiff in error.

Section 2522 of the Revised Laws of Hawaii, 1915, as amended by Act 44, Session Laws of 1919, provides that upon a writ of error "there shall be no reversal * * * for any finding depending on the credibility of witnesses or the weight of evidence."

Colburn v. Long, 21 Haw., 428, 430.

Akatasuka v. McKay, 24 Haw., 600, 604.

Kaleiheana v. Keahipaka, 23 Haw., 169, 171.

See *McCandless v. Du Roi*, 23 Haw., 51, 54.

Also, opinion of Supreme Court in this case, Tr., p. 253.

The proper method of bringing a case of this kind to this court is by writ of error, and not an appeal as has been done in this case.

Carino v. Insular Government, 212 U. S., 449.

Tiglao v. Insular Government, 215 U. S., 410.

Jover v. Insular Government, 221 U. S., 623.

This court, however, will consider and dispose of the case as though it had been properly brought upon a writ of error. That is to say, it will not review facts or reconsider the conclusions of the lower court which find any support in the record.

Gauzon *v.* Compania General, 245 U. S., 86.

The distinction between the scope of review upon writ of error and appeal is well settled in Federal practice. Upon a writ of error the review is limited to a consideration of alleged errors of law.

Gauzon *v.* Compania General, *supra*.

Behn, Meyer & Co. *v.* Campbell, 205 U. S., 403.

Nashville R. & L. Co. *v.* Bunn, 168 Fed., 862.

Some portions of the appellant's brief seem to proceed upon the mistaken theory that the facts can be reviewed by this court.

THE EVIDENCE.

Re Possession: The evidence shows that on June 14, 1860, Kapaakea and Keohokalole, the parents of D. Kalakaua, conveyed all their real and personal property to one C. R. Bishop as trustee for creditors with power and directions to collect the income and apply it to the payment of the debts of the grantors (Ex. 11, Tr., p. 337). Probate Record No. 1839,

which covers the administration of the intestate estates of both Kapaakea and Keohokalole, who died respectively in 1866 and 1869, the latter having been administratrix of the former, shows that Mr. Bishop, as trustee, accounted to J. O. Dominis, administrator of both estates, for a balance of \$226.14 in cash (Tr., pp. 168, 171), the trustee's account showing how the balance was reached, being part of the record (Tr., p. 171). The account shows the regular receipt of rent from one Martin for the land of Kioloku in semi-annual payments covering the years from 1861 to 1868, inclusive (Tr., pp. 172-175). This evidence, which is as good as could be expected to be obtained at this day, shows that the trustee was in possession of the land in question during the period mentioned. In 1870 the administrator filed his final account and received his discharge from the probate court, and at the same time a partition deed was made between the heirs at law of Keohokalole (all of whom had died before this case was tried), by which the several tracts of land of which Keohokalole died seized and possessed were divided between them, the Ahupuaa of Kioloku being among the lands set off to David Kalakaua (afterwards King Kalakaua). See Tr., pp. 170, 179, and Ex. 12, Tr., p. 343. The Territory admitted that from the date of the partition deed, July 1, 1870, to the present time Kalakaua and his successors in interest (including the present claim-

ant) have held actual, open, continuous, uninterrupted and adverse possession of the land, using it for the purposes for which it is adapted, namely, for the cultivation of sugar cane and for the pasturage of stock (Tr., pp. 76, 77, 129, 130). This adverse possession, therefore, had been maintained for a period of at least fifty-two years prior to the commencement of this proceeding in court. We need to draw upon inference only for a period of six years to carry that possession back to the time when the Land Commission could have made an award of the title to Keohokalole. The Commission concluded its work in 1855.

Re Payment of Taxes: The Territory admitted that the land has been assessed by several governments—the Monarchy, Provisional Government, Republic of Hawaii, and the Territory—to, and the taxes thereon paid by the successive occupants since 1870 to the present time (Tr., pp. 77, 78). The successive successors in interest of Kalakaua, and the dates of the several conveyances of this land are as follows:

Deed of Kalakaua and Kapiolani, his wife, to O. B. Spencer, December 13, 1873, recorded in Book 38, page 438.

Deed of O. B. Spencer to A. Hutchinson, May 12, 1874, recorded in Book 39, page 323.

Deed of Executors Estate of A. Hutchinson to C.

Spreckels and W. G. Irwin (copartners W. G. Irwin & Co.) February 28, 1881, recorded in Book 76, page 2.

Release of Dower, widow of A. Hutchinson to Claus Spreckels, April 30, 1880, recorded in Book 65, page 78.

Deed of W. G. Irwin & Co. and J. D. Spreckels & Bros. to Hutchinson Plantation Company, an Hawaiian corporation, November 23, 1884, recorded in Book 93, page 16.

Deed of Hutchinson Plantation Co. to Louis Sloss, June 1, 1889, recorded in Book 119, page 120. The date of this deed is erroneously stated in the transcript (p. 182) as June 1, 1890.

Deed of Louis Sloss to Hutchinson Sugar Plantation Company, a California corporation, June 11, 1889, recorded in Book 118, page 376 (Tr., pp. 179-182).

The Land Court found that the record title from Kalakaua to the claimant was complete (Tr., p. 36).

Supporting Facts and Circumstances: In addition to the assessment and payment of government taxes on the land for the period of forty-three years prior to the filing of this action, and in support of the long-continued adverse possession as evidence of an award of the title to the land, the evidence disclosed a number of corroborative circumstances of more or less cogency, as follows:

On April 8, 1852, the only kuleana within the

Ahupuaa of Kioloku was awarded by the Land Commission to one Kekahuna by L. C. A. 9659 (Tr., pp. 96, 98. Ex. 2). The diagram of the lot so awarded, as incorporated in the certificate of award and exhibited in the Land Court, shows a four-sided parcel of land bounded on each side by "Konohiki" land. The kuleana was located on and the diagram transposed to a plan made by the witness G. F. Wright (Tr., pp. 114, 115; Ex. 9, Tr., p. 334). This, we contend, shows the understanding of the surveyor who surveyed and described the kuleana, and the understanding of the Land Commission itself, that the kuleana was situated within and surrounded by privately owned land. In other words, it is evidence of the common knowledge of the time, of those who were in a position to know, that the title of Kioloku had either passed into private ownership by an award already made by the Land Commission, or, at least, had been assigned to some chief in and by the Mahele of 1848, so that that chief was then in a position to obtain a Land Commission Award of the Ahupuaa for the asking. The admission of this evidence gave rise to quite a controversy as to the meaning of the word "Konohiki." (Tr., pp. 116, 135, 196, 223, 230.)

Mr. Wright testified that the word "Konohiki" as used in old surveys indicated "privately owned lands" (Tr., p. 116), and that though in some instances the word had been applied to government

land, "it is not properly or correctly" so used (Tr., p. 163).

Mr. Emerson said "I have never heard the name konohiki applied to the government lands" (Tr., p. 135); that "konohiki land" meant other than government land (Tr., p. 138); and that "konohiki land" is "land owned by a person who has that land distinguished from general land which is the government land" (Tr., p. 142).

Mr. Kakanui explained that "aupuni" is the proper designation of government land, and "konohiki" of a chief's land (Tr., pp. 229, 230); that government lands and konohiki lands are separate and distinct classes of land (Tr., p. 233); and he wisely said that the correctness of the use of the different terms depended largely on the accuracy of the knowledge of the surveyor (Tr., p. 236).

The map of Kioloku (Exhibit 9) shows that the kuleana of Kekahuna, though lying entirely within the Ahupuaa of Kioloku, adjoins on one of its sides the Ahupuaa of Honuapo which is conceded to be a privately owned land (having been awarded to Lunailo) (Tr., p. 15), and, as we contend, was properly referred to as "Konohiki" land. The statement in the diagram in the award that the other three sides of the kuleana also adjoin "Konohiki" land is therefore evidence that Kioloku was then known as similar kind of land to Honuapo, namely, pri-

vately owned land, and not "unassigned" or "government" land which would have been properly designated by the term ordinarily used with reference to such land, to wit, "Aupuni." "Konohiki," as applied to individuals, originally meant the person in immediate charge of the land on behalf of the King or Chief. But after the Mahele, when lands came under private ownership, the word was applied to the chief or other person to whom an Ahupuaa had been assigned or awarded. But the use of the term as applied to individuals is not important here. The word "Konohiki" as an adjective applied to land (in contradistinction to the noun applied to individuals) had but one signification, and that was that the land had passed into private ownership, and by such designation such land was differentiated from "Aupuni" (Government) land. And hence the well-known classification of lands in Hawaii: (1) Government land, (2) Crown land, (3) Konohiki land, and (4) the kuleanas of the common people. And hence also the significance of a surveyed description of a kuleana showing it as bounded by "Konohiki" land, meaning a chief's land, or "Aupuni," meaning "Government land." Our contention in this respect was fully sustained by the opinion of the Supreme Court (Tr., p. 249).

On December 14, 1859, Royal Patent Grant 2656 in Kaunamano was issued to one Kaiahua (Tr., pp.

98, 99, Ex. 3). The description of that piece of land adjoins "Kioloku" on one side, and on another it runs along "Aupuni," referring to the Ahupuaa of Kaunamano, which is conceded to be Government land (Tr., pp. 116, 118). The survey of that land, therefore, sharply differentiates between "Kioloku" on the one hand and "Aupuni" (Kaunamano) on the other, and shows that Kioloku at that time was understood not to be Government land.

On May 1, 1861, Royal Patent Grant 2748 was issued to one Kaleiku (Tr., pp. 101, 102, Ex. 4). One of its sides is bounded by the land in dispute and it is designated in the grant as "Kioloku," but not as "Aupuni" (Tr., p. 120). The weight of this piece of evidence lies in considering it in connection with the descriptions contained in the surveys of neighboring lands whereby it appears that whenever the land adjoins Government land the survey invariably refers to the adjoining land as "Aupuni" or "Government."

On October 14, 1873, the record of the Boundary Commissioner for the Third Judicial Circuit (R. A. Lyman) shows a proceeding brought under the statute for the settlement of the boundaries of lands which had been awarded by their ancient Hawaiian names, without surveyed descriptions. That proceeding was had upon the application of David Kalakaua (who claimed title through the above-men-

tioned partition deed) for the settlement and adjudication of the boundaries of the Ahupuaa of Kioloku. The record shows that the owners of the adjoining lands had been notified of the proceeding as required by law. In response to the notice, as appears by the Commissioner's record, His Majesty King Lunalilo (owner of the adjoining Ahupuaa of Honuapo) represented by J. G. Hoapili, and the Government (owner of the adjoining Ahupuaa of Kaunamano) represented by W. T. Martin, appeared. The hearing proceeded, testimony was taken and a judgment defining the boundaries of the land by a surveyed description was entered and Boundary Certificate No. 57 issued thereon (Tr., pp. 102-106, Ex. 5 and 6). We do not contend that that judgment has the force of *res judicata* upon the title to the land in dispute since title, strictly speaking, is not in issue in such a proceeding, but it is next door to that because the respective owners of the adjoining lands of Honuapo and Kaunamano had a right to be heard lest their lands should be encroached upon by the judgment which would be entered defining the boundaries of Kioloku.

In Vanfleet's *Collateral Attack*, Sec. 63, p. 93, the author says: "I am unable to conceive of any case where a party in court would not have the right to controvert the jurisdictional facts as well as others. He is called into court to show any cause

of defense he may have why that particular court should not grant the relief prayed for, and if he shows no cause, the granting of the relief is conclusive that he has none. If that were not so, then the validity of a judgment would depend on the volition of the defendant who, instead of having his day in court would have two." See also, 15 R. C. L., Sec. 451. But whether the decision of the Boundary Commissioner had the force and effect of *res judicata* or not it is clear that the appearance of the Government and its submission to the jurisdiction of the Commissioner constituted an admission that Kalakaua was the owner of the land, and, as such, is evidence against the present Government in this case. And we believe that is enough for our purposes here.

No objection having been made by either of the parties to the hearing it amounted at least to an admission on the part of the then King, as the owner of Honuapo, and of the Government, as the owner of Kaunamano, that Kalakaua had the right to maintain the proceeding as the owner of the land of Kio-loku. We regard this piece of evidence as highly important and of great probative force because all the parties concerned in that proceeding—the Commissioner, the King, and the Government's representative—were in a position to personally know the ownership of the land and the precise status of the title,

knowledge which has passed beyond the reach of people now living and who are necessarily obliged to follow theories and rely upon presumptions in the absence of direct proof of the vital facts.

In this connection we may refer to the decision of the Supreme Court of Hawaii in the Paunau case, 24 Haw., 546, the first paragraph of the syllabus of which reads: "A boundary commissioner is authorized to decide and certify boundaries only upon the petition of an owner and his jurisdiction exists only in cases where the petitioner's ownership of the land claimed in his petition is not contested." The failure of the Government in the proceeding before Commissioner Lyman in 1873 to oust his jurisdiction by disputing Kalakaua's ownership of Kioloku constituted an admission that Kalakaua owned the land. The boundaries of the land were conclusively settled. The admission, we think, does not constitute an estoppel here because the subject matter was different. The admission, however, is evidence in this case, as any admission of title either in or out of court would be, to be taken into consideration with all the other facts in evidence. Subsequent purchasers of the land had the right to rely on that admission.

The evidence was also admissible on the other permissible theory, if it needs to be resorted to, viz., that by some agreement or compromise entered into at that time Kalakaua's claim to Kioloku was recog-

nized as valid in consideration of the withdrawing of his claim to the other six pieces of land named in his application.

The appellant's claim that Kioloku is an "unassigned" land rested upon the negative testimony of a single witness, who testified that he searched the records and found no formal evidence of private ownership. The Government's case, therefore, rested upon a very meagre *prima facie* showing. If the contestant had produced an award, patent, or grant of the land, that, of course, would have been the end of the case. But the inability of the contestant to produce such original and primary evidence of title did not end the case by any means. Secondary or circumstantial evidence was admissible. Any and all evidence which tended to show how the land had been claimed, held, used, and treated by the respective possessors, and how it has been regarded, treated, referred to, and described by the Government and its representatives was admissible.

On April 27, 1875, the same Commissioner (R. A. Lyman) issued Boundary Certificate No. 74, defining the boundaries of the Ahupuaa of Honuapo (Tr., pp. 107, 108, Ex. 7). It will be observed that the survey of that land, where it runs along the land of Hionaa, which is a Government land (Tr., p. 121), designates it as "Gov't land," whereas where it runs along Kioloako there is no such designation, thus differen-

tiating between the character of the two lands and showing that Kioloku was then known not to be Government land. (See Tr., pp. 120-124, Ex. 9; Tr., p. 334.)

On June 14, 1876, the same Commissioner issued Boundary Certificate No. 91, defining the boundaries of the Ahupuaa of Waiohinu (Tr., pp. 109-111, Ex. 8). The surveyed description of that land shows that where it adjoins the lands of Kahaea, Kiolokaa, Kaalaiki, and Kaunamano, all of which are admittedly Government lands (Tr., pp. 119, 126-128), the designation "Gov't land" is made in each case (see courses 20 to 24, 33, 34, and 67), whereas in one of the courses (34th), which refers to the land of Kioloku, that land is not designated as Government land, thus again distinguishing between Government and privately owned land (Tr., pp. 124-128). These two boundary certificates and the two grants above referred to show the consistent practice of the surveyors to designate Government lands, whenever they were mentioned as boundaries, as "Government" or "Aupuni," and though the land of Kioloku is referred to in all of them it is in none of them called "Government" or "Aupuni." While no one of these pieces of evidence, taken alone, would be regarded as conclusive, their combined force is irresistible. It shows the common understanding of the people, who were thoroughly posted and intimately

concerned during the period from 1859 to 1876 that the land of Kioloku was not Government land, but, conversely, was land which had passed into private ownership, and hence was properly referred to as "Konohiki" land or simply by name. Matters pertaining to original titles which were common knowledge then are but imperfectly understood at this time, for much of that knowledge and understanding, unfortunately, was not made matter of record for the use and enlightenment of posterity.

In the absence of an award or patent from the Government we were entitled to adduce any competent secondary evidence. The presumption upon which we relied and which the courts below applied arises out of circumstantial evidence. We were entitled to put in evidence tending to show that the Land Commission knew and understood that Kioloku was private land; hence L. C. A. 9659 was admissible. We were entitled to show that the King and Minister of Interior knew and understood that Kioloku was private land; hence the royal patents were admissible. We were entitled to show that the Boundary Commission knew and understood the same thing, hence the two boundary certificates were admissible. And it has been expressly held that such evidence is admissible in cases of disputed title.

In re Pa Pelekane, 21 Haw., 175, 186.

In 1879 one F. S. Lyman made a survey of a portion of the District of Kau, including the locality in which the land of Kioloku is situated (see Tr., pp. 164-167, Ex. 10, Tr., p. 335). On this map, which was numbered 575 and which came from the custody of the Government, he designated the lands of Kauramano, Hionaa and Kaalaiki as "Government," as they undoubtedly were and are, whereas the intervening Ahupuaas of Honuapo and Kioloku were given no such designation, thus showing his understanding that those two lands did not belong to the Government. In other words, the three admittedly Government lands were uniformly designated, while Kioloku was treated the same as Honuapo, which is admittedly privately owned. Mr. F. S. Lyman, who was a brother of the Boundary Commissioner, Mr. R. A. Lyman, and who had worked with the Land Commission, was undoubtedly very familiar with land titles in those early days. His map is entitled to much weight. A note written in pencil on his map on the land of Kioloku, "No title," cannot be regarded as a legitimate part of the map, having been made by another person (Prof. Alexander) at an unknown time (Tr., p. 185). The Land Court so ruled at the hearing (Tr., pp. 166, 167).

What does "No title" mean? In law, of course, there is no such thing as a piece of land with no title. There must be title in some one. The statement "No

title'' without more means nothing. It could as well be claimed that it meant that the Government had no title as that Obadiah Spencer or any one else had no title. As a matter of fact, the statement is so vague that no importance could be attached to it, even if it were in evidence.

In rebuttal, the territory introduced in evidence three maps of Kau District from its own custody, which were admitted over the objections of the claimant (Tr., pp. 188-192). The first was compiled by J. F. Brown in 1885, the second was made by M. D. Monsarrat in 1887, and the third was compiled by F. S. Dodge in 1894 (Ex. A, B, and C, Tr., pp. 298-300). On the first and third the land of Kioloku is designated by color as Government land, while on the second Kioloku is similarly designated as unassigned land. Those maps, we contend, are merely self-serving evidence and as such entitled to little or no weight. The first and third purport to have been "compiled from," among other data, the above-mentioned map of F. S. Lyman, whereas they attempt to overrule Mr. Lyman's understanding that Kioloku was not Government land. By what authority or upon what information the compilers did that we have no means of knowing. We had no opportunity to cross-examine the makers of the maps. Of all the four maps which came from the Government Bureau of Survey certainly the one made by the late Mr.

Lyman, being the older and a declaration against interest, is the better authority. That this is so is shown by the report of the head of the Bureau of Survey, to which we now refer.

On January 9, 1888, W. D. Alexander, Surveyor General under the Government of the Monarchy, in response to a request by L. A. Thurston, Minister of the Interior, made an official report on the subject of "unassigned lands" (Tr., p. 93, Ex. 1; Tr., pp. 319-333).

The report discussed at much length the interesting but academic question of law whether the title to unassigned lands was in the Government or in the heirs-at-law of Kamehameha III. The learned professor took the view that the title to such lands vested in the Government. We have not contended in this case that the title to unassigned lands is not in the Government. The point we make here is that in the exhaustive list of unassigned lands of the islands which was appended to the report the Ahupuaa of Kioloku was not included. This we regard as important evidence that the Government of the Monarchy did not lay claim to the Ahupuaa as an unassigned land. Prof. Alexander was for many years the head of the Bureau of Survey and a recognized authority on land titles. He was called upon by his superior in office to make a special report on the subject of "unassigned lands." The report shows on

its face that he did the work carefully and thoroughly. At the time he made the report there were in his possession, or in his office, three maps of Kau district: Lyman's, Brown's, and Monsarrat's. Lyman had classed Kioloku as private land; Brown classed it as Government, and Monsarrat as unassigned. In the fullness of his knowledge and experience, and familiarity with the subject Professor Alexander did not class Kioloku as unassigned land, which, as his report shows, he would regard as Government land. The conclusion would therefore seem to be unavoidable that the professor agreed with Lyman that Kioloku was privately owned. There is no evidence in the case that the Provisional Government or the Republic of Hawaii ever claimed this land. On the contrary each successive Government levied and collected taxes on the land as private land, and it was only after the present Government of the Territory had levied and collected taxes in the same way for thirteen years after its organization that it asserted a claim and instituted the present proceeding. The attitude of the past Governments of the islands with respect to the land in question ought to be regarded as most persuasive, if not absolutely conclusive, evidence of the status of this land as private land.

After the case had been closed, argued, and submitted, it was re-opened on motion of the Territory and a copy of the application of D. Kalakaua for

the settlement of the boundaries of seven parcels of land, including Kioloku, dated June 23, 1873, was put in evidence (Tr., p. 39). Following that, a stipulation as to certain agreed facts was filed (Tr., pp. 40-42). The application and the stipulation are set forth in full in the record. They need not be repeated here. The stipulated facts more than nullified whatever effect the statement in Kalakaua's application might otherwise have had. The stipulated facts showed the marked and startling difference between the status and treatment of the six tracts other than Kioloku and Kioloku itself, a difference which it was the duty of the Land Court to find a reasonable explanation for. One of the lands mentioned in the application, viz., Kamakamaka, cannot now be located or identified, showing how, in the lapse of time, former knowledge with reference to lands and titles in the islands has been lost or forgotten. One of the lands mentioned, viz., Mohakea, evidently never belonged to Keohokalole, for its boundaries were afterwards settled by the Commissioner on the application of Princess Ruth Keelikolani, tending to show that Kalakaua was not as well posted on the subject of land titles as might be supposed. The other five of the lands mentioned were consistently regarded and treated and dealt with as Government lands. Of the seven tracts of land only Kioloku was recognized as the property

of Keohokalole, and hence, under the partition deed of 1870, as Kalakaua's, and its boundaries settled upon the application in question, and this with the knowledge and acquiescence of the Government. This fact stands out in clear relief. It could not be easily brushed aside. It has not been satisfactorily met or accounted for by anything said by counsel for the Territory. What is the reasonable explanation of the evidence adduced? How could Kalakaua's application to the Boundary Commissioner and the further agreed facts showing the status of and treatment accorded the six tracts of land other than Kioloku, as compared with that of Kioloku, be sensibly and fairly accounted for otherwise than as held by the courts below (Tr., pp. 43, 45, 252)? Was Kalakaua right when he thought Keohokalole had not obtained an award of the land and everybody else was wrong in thinking that she had acquired the title? It reminds one of the old story of the lone jurymen who "never saw eleven such stubborn fools in all his life." There would seem to be three possible theories of this matter, one of which is an unreasonable one and two are reasonable. The unreasonable one is the one asserted and relied on by the Territory, namely, that Kalakaua was right and everyone else was wrong. If Kalakaua was right, the land of Kioloku was unassigned land and belonged to the Government. Then why did

the Boundary Commissioner, with the acquiescence of the Government, recognize Kalakaua as its owner and settle the boundaries of the land upon his application? If Kalakaua was right and the land of Kioloku really belonged to the Government, why did the Government refrain from dealing with it as public property and parcel it out in smaller grants or divide it into homestead lots, as is shown to have been done with all the other of those lands except Mohakea, which was recognized as belonging to Keelikolani, and, possibly, Kamakamaka, which cannot now be positively identified? In short, why was Kalakaua's petition favorably acted upon only as to Kioloku if, as a matter of fact, it belonged no more to Kalakaua than did the other lands named? There must have been some explanation for the distinction made between Kioloku, on the one hand, and the remaining lands, on the other hand. We contend that either of the two theories mentioned in the decision of the Land Court is reasonable. One is that Kalakaua was mistaken and the surveyors and Government officials, who very evidently believed that Keohokalole had acquired the title, were right. This hypothesis would fully and satisfactorily account for the fact that Kalakaua was given a certificate of boundaries for the land, and the further fact that it has ever since been regarded and treated and taxed as private property.

The other is that upon the filing by Kalakaua of the application to the Boundary Commissioner an arrangement or settlement by way of compromise was entered into between him and the Government by which his title to Kioloku would be recognized and confirmed in consideration of his withdrawing or not pressing his application as to the other lands named, direct evidence of which arrangement or settlement cannot now be found (Tr., pp. 44, 45).

The doctrine of presumptions, upon which we rely, applies to contracts, settlements, and compromises as well as to the issuance of grants of land when, under the circumstances of any case, the making of a contract, settlement, or compromise, though there is no express evidence of one having been made, affords a reasonable and logical explanation of the state of facts shown in evidence.

In view of the array of facts and circumstances in evidence, the long-continued and undisputed possession of the land by Keohokalole and her several successors in interest can be explained, as the courts below found, upon only one reasonable hypothesis, and that is of an award of the title to her by the Land Commission, notwithstanding direct evidence of the fact has not been found.

In the case at bar it happens that the land involved is agricultural land. The principle of the common law on which we are relying, however, does not

take account of the character of the land whose title is in dispute. The rule applicable here would apply under similar circumstances to city property covered with valuable improvements.

In the trial of the case counsel for both sides endeavored, as the transcript shows, to save the time of the court and to abbreviate the record by admitting many facts, and by reading into the record excerpts from documentary evidence, with the result that the case has come from the Land Court upon a record of very reasonable proportions.

The lengthy quotation from former Judge Dole's article in the "Overland Monthly" (Brief, pp. 11-36), though interesting, throws no light whatever upon the case at bar. There is absolutely nothing in the history or legislation of Hawaii which would in any way tend to prevent the application of the common-law presumption of a transfer of title in a proper case, such as the local courts found this to be.

In different paragraphs of the brief for the appellant it is stated that this, that, or the other circumstance is not sufficient to authorize the presumption of a grant or award of title. (See Brief, p. 64, *re* collection of rent of Kioloku; p. 65, *re* payment of taxes; p. 73, *re* L. C. A. 9659; p. 75, *re* boundary descriptions; p. 83, *re* appearance of Government's representative before Boundary Commis-

sioner; p. 84, *re* boundary proceeding, and p. 85, *re* Alexander's report.) But, as already stated, the appellee did not rely upon any one item, but upon the aggregate of all the facts and circumstances shown in evidence.

A glossary of Hawaiian words is appended at the end of this brief.

THE LAW.

1.

The importance and far-reaching effect of presumptions are well known, but we desire to preface the citation of authorities having a more direct bearing upon our main contention in this case with reference to a few authorities which discuss the matter of presumptions in a broad way and show their wide application in the determination of legal controversies in our system of jurisprudence. We refer to:

1 Greenleaf, Evidence (14th Ed.), secs. 17, 32, 45.

State *v.* Wright, 41 N. J. L., 478, 482-4.

Carter *v.* Fishing Co., 77 Pa. St., 310, 315.

Williams *v.* Mitchell, 112 Mo., 300, 311.

Reed *v.* Earnhart, 32 N. C., 516.

McGrath *v.* Norcross, 78 N. J. E., 120.

Greenleaf says (sec. 45) : "Thus, also, though lapse of time does not, of itself, furnish a conclusive legal bar to the title of the sovereign agreeably to the maxim 'nullum tempus occurrit regi,' yet, if the adverse claim could have had a legal commencement, juries are instructed or advised to presume such commencement, after many years of uninterrupted adverse possession or enjoyment." And in a note to that section it is said: "Application of the presumption to cases where a grant was implied against the sovereign in England has been made in" a number of cited cases, "and the same principle has been upheld in the United States in favor of the individual as against the state." That section was cited with approval in 159 U. S., 464.

The case of *State v. Wright* furnishes an interesting illustration. In 1758 the State of New Jersey entered into an arrangement with an Indian tribe by which a tract of land was acquired on which Indians were to reside. The legislative act which authorized the arrangement provided that the land should not thereafter be subject to any tax. In 1801, the Indians having gone to reside elsewhere, the legislature passed an act authorizing the sale of the land, and thereafter the State assessed the purchasers for taxes thereon. The Supreme Court held that the assessment was unlawful. In 1804, the legislature repealed the exempting act of 1758. The Supreme Court of

the United States declared the repealing act unconstitutional. Nevertheless the State in 1814 began to assess the land for taxes and continued to do so till 1877, when the matter was again taken into court in the reported case. The court said: "Why, within two years after this successful appeal to the highest tribunal of the country, the owners of these lands submitted to taxation has been the subject of much speculation, and as an historical fact is unaccounted for by the thorough research which has been given to the subject. The only answer which this court can give to the question is to declare the presumption of fact which legally arises from the circumstances which surround the case. To the law the answer will be complete and satisfactory; to history it will be mere inference of the existence of a fact without any absolute proof of it from contemporaneous sources. The case must be solved upon the doctrine of presumptions. * * * From this obligation the State attempted to release itself by the repealing act of 1804. Although the contract could not be receded from in this way, yet the fact that, after this act was declared to be void, the tax was again levied in 1814, and that the relators or their grantors, with full knowledge of their rights, paid the imposition, and have uninterruptedly continued to pay it annually since that time, without questioning the right to levy it, raises a conclusive presumption that by some con-

vention with the State the right to exemption was surrendered.”

The theory that, even if the title to the land was, prior to the proceeding before the Boundary Commissioner, in the Government (which has nothing to support it beyond the mere fact that no award or grant has been found) it, by some arrangement or settlement made between the Government and Kalakaua, passed to the latter, is not only a possible one—it is a reasonable one. It would be the only hypothesis which could sensibly and logically account for the fact that Kalakaua’s successors in the interest were left in unmolested possession through all the years by four successive governmental régimes and the land subjected to taxation as private property were it not for the fact that the presumption that the land had passed into private ownership arises partly from facts which long antedate Kalakaua’s application to the Boundary Commissioner. And those facts, together with the rest of the chain of circumstances shown in evidence, complete the foundation for the presumption on which we rested our case.

2.

A grant from a sovereign may be presumed from long-continued peaceable possession of land, and where the proof of such possession is clear and is

supplemented by evidence of surrounding circumstances pointing to a notorious claim of private ownership and the recognition of that claim by the Government, all of which facts exist in the case at bar, there can be but one conclusion, and that is that the presumption must be recognized and applied.

Grimes v. Bastrop, 26 Tex., 310, 315.

Caruth v. Gillespie, 68 So. (Miss.), 927, 929.

Carter v. Walker, 65 So. (Ala.), 170.

State v. Dickinson, 129 Mich., 221.

Tracy v. R. Co., 39 Conn., 382, 393.

U. S. v. Chaves, 159 U. S., 452, 464.

U. S. v. Chavez, 175 U. S., 509, 518.

In 2 *Corpus Juris*, 290, it is said: "A grant from a sovereign may be presumed from long-continued peaceable possession of real property, accompanied by the usual acts of ownership, even as against the sovereign itself." It was so held by the United States Supreme Court in the *Chaves* and *Chavez* cases. Those cases did not turn upon the construction of any provision of the statute establishing the Court of Private Land Claims or upon any provision in the treaty with Mexico, but were determined upon a well-recognized principle of common-law jurisprudence. In the *Chaves* case the court said: "The principle upon which the doctrine rests is one of general jurisprudence, and is recognized in the Roman law

and the codes founded thereon." That passage was quoted with approval in the Chavez case.

Referring to those cases, counsel for the appellant say (Brief, p. 91): "It will be seen that the citations relied upon by the contestant in the case at bar are simply obiter dicta." But a careful reading of the opinions in those cases will show the contrary.

The case of *U. S. v. Chaves* was an appeal from a decree of the Court of Private Land Claims, established by an act of Congress of March 3, 1891. The petitioner's claim of title to the land in dispute was based on an alleged lost grant of a Mexican governor. The decree confirming the claim was affirmed by the Supreme Court. The principle applied in that case clearly applies to the case at bar. The court there said (p. 463): "Not only was there evidence of the existence of an original grant by the Government of New Mexico, and the loss of original records sufficient to justify the introduction of secondary evidence, but there is the weighty fact that for nearly sixty years the claimants and their ancestors have been in the undisturbed possession and enjoyment of this tract of land. * * * However, we do not wish to be understood as undervaluing the fact of a possession so long and uninterrupted as disclosed in this case. Without going at length into the subject, it may be safely said that by the weight of authority, as well as the preponderance

of opinion, it is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et de jure* whenever, by possibility, a right may be acquired in any manner known to the law. Nothing, it is true, can be claimed by prescription which owes its origin to, and can only be had by, matter of record; but lapse of time accompanied by acts done, or other circumstances, may warrant the jury in presuming a grant or title by record. Thus, also, though lapse of time does not, of itself, furnish a conclusive bar to the title of the sovereign, agreeably to the maxim *nullum tempus occurrit regi*, yet, if the adverse claim could have a legal commencement, juries are advised or instructed to presume such commencement, after many years of uninterrupted possession or enjoyment. Accordingly royal grants have been thus found by the jury after an indefinitely long-continued peaceful enjoyment, accompanied by the usual acts of ownership."

The case of *U. S. v. Chavez* also was an appeal from a decree of the Court of Private Land Claims. The petitioner claimed under two Mexican grants. The claim was confirmed by the court below and its decree was affirmed by the Supreme Court. In that case two pieces of land were involved, or, more cor-

rectly, two cases (Nos. 38 and 39) were covered by the one opinion. (See the title of the case and the remarks of the court on page 517 of the report.) The basis of the title to the southern portion of the tract which was involved in case No. 38 was "a grant made on the 5th day of November, 1716, to Captain Antonio Gutierrez" (p. 510), while as to the northern portion of the tract which was involved in case No. 39 "the archives referred to and the documentary evidence are the same as in No. 38, except there is no grant" (p. 517). The discussion in the opinion of the court applied principally to the last case mentioned or, as the court stated in the beginning of its opinion, to the title which was "deficient in the support of direct evidence." The discussion, therefore, clearly applies in the case at bar. It was alleged in the petition that the original grant papers evidencing one of the grants had been lost or destroyed and could not be produced. It appeared, however, that the existence of a grant had been recognized in a certain judicial proceeding of distribution among heirs which might be compared to the partition deed in the case at bar, which was reported to the court in his petition for discharge by the administrator of the estate of Ane Keohokalole. It further appeared that the petitioner and his predecessors had been in possession of the land for over one hundred and thirty years.

though there were breaks in the chain of paper title. The fact that the possession there had been longer continued than in the case at bar does not differentiate the case as an authority, since, as shown by the decision in the Chaves case, twenty years' possession is enough. The court in its opinion said (p. 518): "The title asserted by appellees is deficient in the support of direct evidence. Is the deficiency supplied by the probative force of the possession of the land? Private ownership of the property with possession is claimed for over one hundred and thirty years before the cession of the Territory to the United States. A continuous possession is shown from some time prior to 1785, inferentially from 1716. Mexico respected that ownership and possession for the full period of its dominion over New Mexico. Spain respected them for over one hundred years, and at the time of the cession of the sovereignty over the Territory to the United States no one questioned them. Succeeding to the power and obligations of these governments, must the United States do so? This is insisted by their counsel, and yet they have felt and expressed the equities which arise from the circumstances of the case. Whence arise those equities? That which establishes them may establish title. Upon a long and uninterrupted possession, the law bases presumptions as sufficient for legal judgment in the

absence of rebutting circumstances, as formal instruments, or records, or articulate testimony. Not that formal instruments are unnecessary, but it will be presumed that they once existed and have been lost. The inquiry then recurs, Do such presumptions arise in this case, and do they solve its questions?" The court then quoted copiously from *Fletcher v. Fuller*, 120 U. S., 534, and *U. S. v. Chavez, supra*, and said (pp. 523, 524): "We think there can be but one conclusion in this case. The possession of the land began in wrong or began in right. If in wrong, it must be shown. The maxims of the law declare the other way. * * * Back to Clemente Gutierrez, therefore, a continuous possession is established by admission and by testimony not contradicted. Back beyond the period of living memory and beyond that period the title needs no inquiry for its validity and repose. * * * It is to this possession that the appellees trace, as we have seen, and the questions which can arise about it—from whom derived and the rightfulness or wrongfulness of it—depends upon principles already sufficiently discussed. It is enough to say that Clemente Gutierrez died in possession, and his possession was proof of ownership."

In the second Chavez case (175 U. S., 552), cited on page 97 of the opposing brief, there was no room for the operation of the presumption of a grant for

two very good reasons, which were pointed out by the court on page 563 of the report, namely, (1) that the plaintiff expressly claimed under a grant which had been issued by a body "which had no legal power to make it," and (2) that the period of possession fell short of the 20-year rule laid down in the Chaves case, since a period of only seventeen years' possession (1831 to 1848), had been shown. Either of those two facts was sufficient to defeat the claim. In the case at bar the evidence shows a continuous possession since 1861, and, inferentially, since a date prior to the close of the sittings of the Land Commission, in 1855. That case, therefore, is not an authority against us.

It is impossible, of course, to find cases which are exactly on all fours with the case at bar as to the facts involved. A duplicate of the history of Hawaiian land titles cannot be found. But the determining principle involved here is one of common law, and it is as fully applicable to a case arising in the courts of Hawaii as it would be in a case in a Federal, State, or English court. From the standpoint of the common law the facts shown in none of the cases quoted from (or cited), taken as a whole, presented any stronger claim to the application of the principle invoked than those of the case at bar. In the Chaves case there was some evidence that a grant had been made, but the court did not

rest its decision on that fact any more than on the fact of nearly sixty years' possession. In the Chavez case the period of possession was longer, but as to one of the tracts of land involved there was no evidence whatever that it had ever been granted by the Government. The court quoted with approval the paragraph from the Chaves case in which it was stated that twenty years' possession was enough. In neither of those cases was there such evidence as there is in this case, that early Government surveys showed that the land in dispute was regarded as private land during the time the Land Commission was sitting and shortly after; that in a court proceeding for the settlement of the boundaries of the land the Government had appeared and impliedly, at least, recognized the claim of title of the party in possession; that the Surveyor General of a prior government of the country reporting specially on "unassigned" lands had not claimed the land in dispute to be such, nor that successive governments for forty-three years had taxed the land as private property.

The authorities do not make proof of the destruction of the public records a prerequisite. A paragraph of the syllabus to the case of *Valentine v. Piper*, 22 Pick., 85, reads: "It is competent to the jury to presume a lost deed of real estate where, from long-continued and uninterrupted possession

and other circumstances, such a presumption can reasonably be made; and in such case the rule that a deed cannot be given in evidence unless registered does not apply; or it may be further presumed that the lost deed was registered and that the record has been lost or destroyed." The presumption does not rest on the idea that a grant was actually made and has been lost, but on the fact that one might have been made and the making of it would account reasonably for the circumstances, acts, and events which are shown to have transpired. The presumption is indulged for the purpose of quieting long-continued possessions. "The rule of presumption, in such cases, as has been well said, is one of policy, as well as of convenience, and necessary for the peace and security of society" (120 U. S., 546).

The Supreme Court of the United States, in an early case, pertinently said: "Nothing so much retards the growth and prosperity of a country as insecurity of titles to real estate."

Lewis v. Marshall, 5 Peters, 470, 477.

3.

The presumption here relied on extends, not merely to the bare fact of the making of a grant or award, but to everything necessary to give it validity,

such as the issuance of it by proper authority and its recordation, if necessary.

“It will be sufficient ground for the presumption to show that by legal possibility a grant might have issued; and this appearing, it may be assumed, in the absence of circumstances repelling such conclusions, that all that might lawfully have been done to perfect the legal title was in fact done, and in the form prescribed by law.”

Williams *v.* Dowell, 2 Head, 695, 698, quoted with approval in Fletcher *v.* Fuller, 120 U. S., 534.

In U. S. *v.* Pendell, 185 U. S., 189, which cited with approval the Chaves and Chavez cases, the court said (page 198): “The evidence is sufficient not only to presume a grant, but to presume any other matter which would have occurred in order to render the grant a perfectly valid one and the evidence of it sufficient within the requirements of the treaty” of 1853 with Mexico. Also that “possession under a grant, so long continued and so complete as is the case here, may well authorize the presumption that the lieutenant-governor (whose authority was questioned) was either a subdelegate or that he had been authorized or his act ratified by the governor and the grant duly recorded.” And on page 199 the court said: “A record may in a case like this be presumed to have been made, just as well as the existence of a grant may be presumed.

* * * Taking all the evidence, there is room for the presumption of a record of the grant as well as that for the existence of the grant itself."

In *Proprietors v. Bullard*, 2 Met., 363, 367, the court said: "It was objected that such a deed must have been recorded in the parish books. But it is to be considered that when a lost deed is rightfully presumed from circumstances, they will also raise the presumption that whatever was necessary to give the deed effect, as acknowledgment, registration, or other act, was duly done."

4.

As to the nature and conclusiveness of the presumption. It is not necessary that the Land Court should have been satisfied that an award or grant was in fact issued by the Government. It is sufficient that the court believed it to be probable that an award or grant may have been made and was satisfied that the making of it is the only satisfactory hypothesis in view of all the circumstances.

"It is not necessary, therefore, in the cases mentioned, for the jury, in order to presume a conveyance, to believe that a conveyance was in point of fact executed. It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed and that its existence would be a solution of the difficulties arising from its non-execution."

Fletcher v. Fuller, 120 U. S., 534, quoted with approval in 175 U. S., 509, 521.

“It is not indispensable, in order to lay a proper foundation for the legal presumption of a grant, to establish the probability of the fact that in reality a grant was ever issued. It will be a sufficient ground for the presumption to show that, by legal possibility, a grant might have been issued.”

Williams v. Dowell, 2 Head., 695, 697, quoted with approval in 120 U. S., 534, 548.

“Lord Coke says somewhere that an act of Parliament may be presumed; and of late it has been held that even in the case of the Crown, which is not bound by the statutes of limitation, a grant may be presumed from great length of possession. It was so done in the case of *The Corporation of Hull and Horner*, not that in such cases the court really thinks that a grant has been made, because it is not probable a grant should have existed without its being upon record; but they presume the fact from a principle of quieting the possession.”

Eldridge v. Knoll, 98 Eng. Rep. (reprint), 1050, per Lord Mansfield.

The application of these principles to the evidence in this case we think clearly required that the presumption should be invoked and applied for the purpose of quieting the long-held possession of the claimant and its predecessors in interest, and to that end whatever is necessary to give validity to its claim of title should be presumed, since there certainly was, under the evidence, the “legal possibility” that an award was made to Ane Keohokalole, the making of

which would solve all uncertainty and terminate all ground for dispute.

5.

Whether the presumption is one of fact or law is not entirely clear, and it makes little practical difference here, since disputed facts cannot be reviewed. Perhaps the proper view is that where the facts are in dispute or, if not actually disputed, are more or less equivocal and capable of more than one reasonable inference, the whole matter should be left to the jury (if it be a jury case), whereas if the facts are such as to permit of only one such inference, it becomes a pure question of law.

In the case of *Valentine v. Piper*, 22 Pick., 85, 94, Chief Justice Shaw said: "Such a question is a mixed question of fact and law to this extent, that the facts being found, it is for the court to advise the jury whether in their nature and quality they are sufficient to raise the presumption proposed, the weight of the evidence being for the jury."

In *Brown v. Spreckels*, 18 Haw., 91, 107, the trial court had submitted the question to the jury on the evidence. The Supreme Court said: "In our opinion the evidence was such as to permit, if not require, the jury to find against the theory of a lost grant." The court also pointed out that "this is not the case of an

absence of direct proof of a deed of the land in question from Pitman to Spencer in 1861, but the case of a proved deed which omits the land in question below Front street, although it includes land above Front street." It was, therefore, hardly a proper case in which to invoke the presumption of a lost conveyance.

It is a presumption "rather of law than of fact."

Crooker v. Pendleton, 23 Me., 339, 342.

It has been held to be a presumption of law, founded in the interest of the law in peace and order, for the purpose of protecting and quieting long-continued possession of land.

Folsom v. Freeborn, 13 R. I., 200, 207.

Central Coal Co. v. Penny, 173 Fed., 340, 343.

Hewling v. Blake, 70 So. 247, 248.

U. S. v. Chaves, 159 U. S., 452, 464.

U. S. v. Chavez, 175 U. S., 509, 522.

"We will add, moreover, that though a presumption of a deed is one that may be rebutted by proof of facts inconsistent with its supposed existence, yet where no such facts are shown, and the things done, and the things omitted, with regard to the property in controversy, by the respective parties, for long periods of time after the execution of the supposed conveyance, can be explained satisfactorily only upon the hypothesis of its existence, then the jury may be

instructed that it is their duty to presume such a conveyance, and thus quiet the possession.”

Fletcher v. Fuller, 120 U. S., 534, 550.

That case was referred to in *Brown v. Spreckels*, *supra*, and the paragraph just quoted would have had a closer application to the case at bar if this case had been tried before a jury, and, we submit, it would have required such a direction as was there suggested.

The “presumption does not operate like the statute of limitations, and bar a right which is known to exist; or like laches, which deprives one of the right which did exist. It operates as evidence, and establishes the conclusion that the right which did exist has been duly relinquished by the possessor of it.”

U. S. v. Devereaux, 90 Fed., 182, 187.

6.

As to the payment of taxes: The payment of taxes on land is strong evidence of a claim of title by one in possession in cases between individuals, especially where, as in this case, it has been long continued.

O. R. & L. Co. v. Kaili, 22 Haw., 673, 678.

Holtzman v. Douglas, 168 U. S., 278, 284.

Such payment is also potent evidence against the Government which has levied and collected taxes upon

land, as it practically amounts to an admission of title in the party who has paid the taxes.

In the case of *Smith v. City of Osage*, 80 Iowa, 84, 88, 89, the court said: "In the case before us it (the city) has permitted the plaintiff, and those under whom he claims, to occupy the land, which has never been subject to public use, and it levies and collects city taxes thereon. The law regards this as a declaration by its acts that it holds no claim to the land, and as an abandonment of all claim to the public use of the land. The city may vacate streets and other public lands and restore them to private owners by proper action. The same end may be attained by abandonment and non-use, and by taxation, and in other ways treating the land as private property. The city will be estopped to set up any claim to land to which the right of the public use has been abandoned by subjecting it to taxation as private property."

In the case of *Busby v. R. Co.*, 23 S. E. (S. C.), 50, 53, which was an action for damages against a railroad company, the plaintiff was put to the necessity of proving title to his land. He relied upon evidence of adverse possession for the period of fifteen years, but there was no evidence that the land had ever been granted by the State. It was shown, however, that the plaintiff had paid taxes on the land during that period. On that point the court said: "Now, the fact that the plaintiff had been paying taxes on the land

for a number of years * * * and the further fact that it did not appear that the State was setting up any claim to this land do afford evidence—whether sufficient or not it was for the jury to determine—that the State had parted with its title to the land, for certainly we would not be justified in assuming that the State would collect taxes on its own land.”

In the case of *Jover v. Insular Government*, 221 U. S., 623, 633, which originated in the Court of Land Registration of the Philippine Islands and involved a controversy between the petitioner and the Government over certain tide lands, the petitioner claimed title under a grant made in 1859 by the Spanish Governor General. The respondent contended that the Governor General had no authority to make the grant. As in the case at bar, the title had not been disputed by the former government of the country, but on the contrary, as in the case at bar also, the Government had imposed taxes on the land as private property. With reference to that point the court said: “The Spanish authorities at Manila, although familiar with what was done and claimed under the grant, and although in a position to know and enforce the law applicable to it, did not call it in question at any time during the thirty-nine years of Spanish dominion after it was made, but, on the contrary, treated it as valid by imposing taxes upon the land as private property. This is persuasive proof

that in making the grant the Governor General did not exceed his authority.”

The fact that in that case the validity of the grant was disputed, and not its issuance, does not differentiate it from the case at bar so far as concerns the principle involved. The point of the matter is that by levying and collecting taxes on land the Government admits that the land does not belong to it, but that the title to the land has passed into private ownership.

Where taxes have been collected upon land for a long period of time by former governments of the country, it is no proper function of a new government to attempt to disturb the possession and uproot the title of the party from whom taxes have been so collected, and other facts and circumstances indicate strongly that title had been obtained from the Government, merely because evidence of the original award, which might have been issued over sixty years before the title was questioned, cannot be found. (See *Carino v. Insular Government*, 212 U. S., 449, 460.)

7.

The presumption of the common law is in force in Hawaii unless it was repudiated by judicial decision prior to 1893.

Revised Laws of Hawaii, 1915, sec. 1.

On behalf of the appellant it is contended that the presumption does not apply as against the Territory of Hawaii. This proposition we emphatically deny.

The case cited in support of the contention and which it is said "settled the doctrine once and for all in this Territory" (Brief, p. 101) is *Kahoomana v. Minister of the Interior*, 3 Haw., 631.

An examination of that case, however, shows that it has none of the earmarks of a case involving the common-law presumption. It was adverse possession and the statute of limitations that was relied on there, and, of course, unsuccessfully. On page 639 the opinion states that "counsel for the plaintiff, after their case had closed, showed the court a copy of an application for an award of this lot by Namauu. The Land Commission, however, did not award it; and by the force and effect of the statutes above quoted it must be considered to still belong to the Government." In the trial court it had been admitted or proven that no award had been issued for the land in dispute. There was no possible basis, therefore, for a claim under the common-law presumption. The plaintiff showed possession of the land from previous to the year 1829 to the year 1872, part of the period being prior to the Land Commission and part of it subsequent. As to the possession prior to the Land Commission, the court said (p. 640): "But, as against the Government, a grant can-

not be presumed or inferred from long possession in view of the law which required claimants of land to present their claims to the Land Commission for confirmation or rejection." Then, referring to the possession subsequent to the Land Commission the court said: "But it may be urged that the length of adverse possession since the closing of the Land Commission creates the inference of a grant. To this the answer is complete. There is no prescription against the State." The court also took the trouble to explain that "The theory of titles by prescription is that the holding possession of an estate openly and adversely for a certain length of time creates an inference that there was a grant from the adverse claimant or his ancestors, and the statute of limitations forbids the adverse claimant from setting up against this long-continued possession the fact that there was no grant." The court then quoted from two U. S. Supreme Court cases to the effect that the statute of limitations does not run against the State, and concluded its opinion saying: "For the reason, therefore, that the mere possession of this lot by the plaintiff and her ancestors makes no presumption of a grant as against the Government, judgment must be rendered for the defendant."

In referring to the "presumption" of a grant the court had in mind the principle of prescription upon which the statute of limitations is based. In many

jurisdictions the view prevails that the statute of limitations is a statute of repose and constitutes not merely an arbitrary bar to the assertion of the paper title, but operates to transfer the title to the adverse possessor. The other (and older) view is that the effect of the statute is to create the presumption of a grant. That is the view which has been taken in Hawaii and has found expression in the case of *Do Rego v. Halama*, 24 Haw., 750, an action of ejectment, where the court said: "Where the possession has been actual, open, and exclusive for the period prescribed by the statute of limitations to bar an action for the recovery of land the presumption of a deed is conclusive."

Warvelle, in his work on ejectment, claims that this is the logical view, although it is a matter of little practical importance. In section 418 of that work the author says: "The old theory (of presumption) is supported by sound legal reason, while the later notion, that mere occupation with the presumed acquiescence of the owner is itself an actual transfer of title, is opposed to all of the rules of conveyancing as well as the general theories of the law respecting the transfer of proprietary rights. However, the theory involved is a matter of minor importance, for under either theory the result is the same."

In the light of all this, then, the reference in the Kahoomana case to a presumed grant is easily under-

stood. That case did not purport to deal with the common-law presumption, but solely with the statutory presumption.

The distinction between the common-law presumption of a lost grant or conveyance and adverse possession under the statute of limitations is pointed out in 2 *Corpus Juris*, sec. 650, pages 288, 289. Under the statute of limitations the rule is an arbitrary one and the presumption is conclusive, whereas the common-law presumption is a rebuttal one, and it was so regarded and treated in the trial of this case in the Land Court.

In Jones-Horwitz, Evidence, sec. 77, it is said: "The party relying on his possession may, of course, call to his aid the statute of limitations where it is applicable, and if he relies upon the statute, the proofs must show compliance with its provisions. But the statute of limitations does not supersede the common-law presumption, and, if this is relied upon, possession for less than a period prescribed by the statute, may, with other cogent circumstances, sustain the claim of conveyance or a lost grant. The length of time which brings a given case within the legal presumption of a grant or charter to validate a right long enjoyed is not definite, but depends on its peculiar circumstances. It may be necessary to seek the aid of this presumption in some cases where the statute of limitations does not apply, as where it is urged against the state."

On page 101 of the opposing brief it is said that the Kahoomana case "has never been reversed and has been cited with approval in many cases."

In *Territory v. Puahi*, 18 Haw., 649, 652, the Kahoomana case was cited as authority to the point that "upon no theory could a claim by prescription go back of the Mahele."

In *Galt v. Waianuhea*, 16 Haw., 652, 658, it was said that: "The proposition that title by adverse possession presumes a grant and that such proposition cannot be entertained against one incapable of granting (1 Cyc., 1113) was approved in *Kahoomana v. Minister of the Interior*, 3 Haw., 635, 640."

In the case of *Estate of Kekauluohi*, 6 Haw., 172, the Kahoomana case is cited merely to the point that the Land Commission was a court having jurisdiction to consider claims to land arising prior to December 10, 1845.

In the case of *Atcherley v. Lewers and Cooke*, 18 Haw., 625, the Kahoomana case is only incidentally referred to as one which discussed the statutes relating to the Land Commission.

And while the Kahoomana case has been cited as an authority for the proposition that the statute of limitations does not run against the Government, it has never been cited as holding that the common-law presumption of a grant or other transfer of title was not in force in Hawaii.

In *Kunewa v. Kaanaana*, 18 Haw., 252, 253, it was said: "As early as 1875 this court held that the statute of limitations of real actions does not run against the Government (*Kahoomana v. Minister of the Interior*, 3 Haw., 631)."

In *Thurston v. Bishop*, 7 Haw., 421, the report shows (p. 424) that: "It is admitted by the defense that no claim for this land on behalf of Lot Kamehameha was presented to the Land Commission according to law." No question as to the presumption of an award, therefore, could have arisen in that case. The principal question there was whether the limitation of time in which claims could be presented to the Land Commission applied to Lot Kamehameha during his minority. It was held that it did. The court then quoted from the case of *Lindsay v. Miller's Lessee*, 6 Pet., 666 (which was one of the cases cited in the *Kahoomana* case), to the effect that it is a well-settled principle that the statute of limitations does not run against the State, and said: "This was adopted in *Kahoomana v. Minister of the Interior*, 3 Haw., 635."

In *Minister of the Interior v. Parke*, 4 Haw., 366, 369, the court said: "In the case of *Kahoomana v. Minister of the Interior*, 3 Haw., 635, it was held that the statute of limitations of real actions does not run against the Government."

It seems to us that this court will surely adopt the

view of the Kahoomana case which was taken by the local courts.

8.

Although the evidence in this case showed that Ane Keohokalole was in possession of Kioloku as far back as 1861, and we consider the length of the period of possession to have been more than ample to support the presumption of title, the law will permit the inference of even prior possession.

In 2 Chamberlayne, Evidence, sec. 1030, p. 1230, it is said: "To prove the existence of a fact or of a continuous state of things at a given time, is often, in itself, practically impossible. The most which can be done is to show its existence at a previous or subsequent period and ask the tribunal to draw from this proof an inference that it existed at the time in question."

See also:

Laplante *v.* Mills, 165 Mass., 487, 489.

Brooke *v.* Winters, 39 Md., 505, 509.

9.

The peaceable possession of land is itself evidence of title in the party in possession.

Carino *v.* Insular Government, 212 U. S., 449, 460.

Hazard Powder Co. *v.* Volger, 58 Fed., 152, 154.

Mygatt *v.* Coe, 147 N. Y., 456, 462.

10.

On page 88 of the opposing brief it is said that the rule that execution of a deed in compliance with an order of court will be presumed was repudiated in the Lewers & Cooke case, 18 Haw., 625. It is a side point of little or no importance, but we do not care to let the misstatement pass unchallenged. In the case referred to the court said (page 632): "There is no record that the conveyance decreed was ever made, David Kalakaua and his successors apparently relying upon the decree and their possession thereunder." There was no reference to or repudiation of any presumption there. That case itself was repudiated by the Supreme Court of the United States in 238 U. S., 119, 136.

11.

The evidence in regard to the proceeding before the Boundary Commissioner upon the application of D. Kalakaua for the settlement of the boundaries of the Ahupuaa of Kioloku (Tr., pp. 102-105, Ex. 5), wherein the Government, though represented, did not question Kalakaua's ownership, was relevant and material under the rule that either party to an action may show that the other has failed to assert a claim which he now makes, though an opportunity

to assert it was offered, or now claims a certain right though in the past he has done acts which were inconsistent with the actual existence of the right now set up.

2 Chamberlayne, Evidence, secs. 1393, 1395.

Eaton *v.* Telegraph Co., 68 Me., 63, 66, 67.

Stanwood *v.* McLellan, 48 Me., 275, 278.

O'Donnell *v.* Kelsey, 10 N. Y., 412, 417.

Springer *v.* Drosch, 32 Ind., 486.

Garey *v.* Sangston, 64 Md., 31.

Allen *v.* Westbrook, 16 Lea, 251, 255.

Townsend *v.* Scurlock, 44 Tex. Civ. App., 141.

12.

Although the general subject of presumptions at common law is a doctrine of general jurisprudence, in the application of which this court would be entirely free to form its own judgment, yet in the case at bar the application of the presumption of a transfer of title growing out of proof by secondary evidence is so complicated with purely local conditions and so involved with Hawaiian history and procedure and matters of which the local courts would take judicial notice, that there is every reason for attributing unusual weight to the opinions of the Hawaiian courts. The Supreme Court of the United States, in a Hawaiian case, said: "The

contentions thus presented have intricate character and can only have clear comprehension in local experience and understanding and are best determined by local interpretation and the decisions of the courts on the spot."

Kapiolani Estate v. Atcherley, 238 U. S., 119, 136.

It is admitted on page 10 of the appellant's brief that "From what has already been said, it will appear to the court that the case at bar involves a study of the evolution of Hawaiian land tenures, as without such study many things appearing in the record must be incomprehensible." The reason for applying the rule adopted by the Supreme Court is, therefore, obvious.

ALLEGED ERRORS.

We will notice the assignments of error in the order in which they have been referred to in the brief for the appellant.

Assignments Nos. 8 and 9.

These refer to the rulings of the Supreme Court of Hawaii to the effect that the evidence adduced by the claimant "irresistibly lead to the conclusion that Kioloku had been awarded to Ane Keohokalole," and

that it was "sufficient to sustain the judge of the Land Court in presuming that a grant of Kioloku was issued to Ane Keohokalole, the grant itself having been lost or for other reasons cannot now be produced."

We do not believe that this court will review the findings of the Land Court, or will look into the evidence any further than will enable it to say, as the Supreme Court said, that the findings were sustained by the evidence.

It is contended (Brief, p. 47), that an examination of the records fails to show the existence of any award, grant, or patent affecting the land in question, and the direct examination of the Government's searcher is quoted at length. The cross-examination of the witness is not referred to, although it was the basis of the finding of the Land Court that "there remains the possibility that evidence of an award of Kioloku to Keohokalole actually exists in the records of the Land Commission."

The statement (Brief, p. 53) that "if any grant had actually been made, the evidence of such grant would naturally be rather with the contestant than with the petitioner," is negatived by the facts that the records of the Land Commission were kept in the office of the Minister of the Interior (Brief, p. 41), and that all patents are recorded in duplicate in the same office of the Government (Brief, p. 39).

This case, therefore, falls within the rule recognized in *United States v. Denver, etc., R. Co.*, 191 U. S., 84, 92, that when "the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative." But the case at bar did not turn upon any such narrow question as the burden of proof.

On page 52 of the appellant's brief reference is made to the fact that the report of the examiner of titles, an officer of the Land Court, was adverse to the claimant. The conclusion of the examiner of titles, however, was not evidence in the case.

In re Pa Pelekane, 21 Haw., 175, 185.

On page 54 of the appellant's brief it is contended that the absence of an award, patent, or grant is proved from the fact that there is no Mahele of the land to Ane Keohokalole.

There was no statute, however, which required a Mahele to be in writing or recorded. Indeed, there was no law which required the Mahele itself. It was an ultra-legal proceeding, and the Land Commission could have performed its functions under the act of 1845 even if the Mahele had never taken place. Reference to the Mahele of Kioloku to Keohokalole could more easily have been omitted from the records of the Mahele than could reference to an award of the title have been omitted from the records of the Land Commission, yet that was quite possible.

It is incorrect to say (see Brief, p. 55) that "without a Mahele of the land to the chief there could be no award by the Land Commission," and that "the absence of such a Mahele constitutes absolute proof that there was no award of the Land Commission."

The great Mahele did not confer title to the lands therein set apart to the chiefs. In order to obtain title to the lands it was necessary for the chiefs to present their claims to the Land Commission under the statute of 1845. That commission was given jurisdiction to adjudicate all claims to land arising prior to the enactment, including the claims of chiefs.

Estate of Kekauluohi, 6 Haw., 172.

The awards made by the Land Commission marked the commencement of legal titles to land in Hawaii.

Kenoa v. Meek, 6 Haw., 63, 67.

In re Pa Pelekane, 21 Haw., 175, 185.

This is admitted on page 40 of the appellant's brief. There was no law which prevented the Land Commission from awarding title to land in the absence of a Mahele. As a matter of fact, the great bulk of the upwards of eleven thousand awards made by the Commission were of lands which were not enumerated in the Mahele.

Furthermore, the rule, hereinabove referred to, that where the circumstances are such as to warrant the presumption of a grant from the Government

everything necessary to have been done to give it validity will be presumed to have been done would apply to a Mahele, if that were necessary. (See *Fletcher v. Fuller* and *United States v. Pendell, supra.*)

The same may be correctly said in regard to action by the Privy Council in cases of direct grant, referred to on page 55 of appellant's brief, and as to Mahele awards by the Minister of the Interior, referred to on page 56 of the brief.

On page 58 of appellant's brief it is pointed out that in the various mesne conveyances of the land of Kioloku there was no statement of the derivation of title. Other lands were conveyed by the deeds referred to, but it does not appear that Kioloku was treated any differently from them. There would seem to be no force in the contention there made.

The same may be said as to the point made on page 60 of appellant's brief in regard to the conveyance in trust to C. R. Bishop by Keohokalole and her husband. In Hawaii, as elsewhere, title to land passes by quit-claim or other form of deed without stating the derivation of title, and the failure to state such derivation casts no reflection upon the title.

The statement contained in the application of D. Kalakaua to the Commissioner of Boundaries on June 23, 1873, has been so fully discussed hereinabove

and was so completely disposed of in the decisions of the two local courts that we think no further comment is necessary.

It is said (Brief, p. 62) that Kalakaua's admission is entitled to the greatest weight. But the evidence was weighed by the trial court, and it will not be reweighed by this appellate court.

Pages 63 to 86 of appellant's brief contain a discussion of the evidence for the claimant, with criticisms of its weight and comments upon its alleged weakness which would seem to require no reply from the appellee, since this is not a general appeal which would bring up the facts for review. However, we deem it advisable to make some comments thereon.

On page 63 of the brief it is noted that there is nothing in the accounts of C. R. Bishop which were filed in the probate court to show that the land of Kioloku there mentioned is the land in dispute in this case. We say that the identity of name is evidence of the identity of the land. If there is another land named Kioloku in the Hawaiian Islands it was for the petitioner to prove it. There was no such evidence. The fact that the trustee collected and accounted for rents from the land of Kioloku, coupled with the fact that the partition deed of 1870 mentions Kioloku as one of the lands which was inherited by the heirs of Keohokalole, is ample evidence of identity.

On page 64 of the brief counsel say that they have been able to find no inventory of the land in the record of the probate court. But the administrator of the estate of Keohokalole had no jurisdiction over the real estate of the decedent, except so far as it was necessary to sell portions thereof to pay her debts.

Estate of Kaiena, 24 Haw., 148.

It is said (Brief, p. 64) that Ane Keohokalole may have received permission from the King and chiefs to use the land. That is inconsistent with the appellant's claim that Kioloku was Government land, since in that event the King and chiefs would have had no authority to give such permission. If Martin had rented the land the records of the Interior Department should show the execution of a lease and the receipt of rent. No such evidence was adduced.

On page 65 it is said that the occupants of the land would be ready and willing to include the land of Kioloku in their assessment, expecting thereby to fortify their position. But under the law the levy and assessment for taxation were made by the tax assessor, and he included therein the land of Kioloku, and the Government took the money. On the same page of the brief it is admitted that the Government never collected rent for the land, and this is a potent fact against the Territory's present claim of title.

On page 66 reference is made to the diagram in Award 9659, which shows that the kuleana was surrounded by konohiki land, referring to the land in dispute, and there follow quotations from the testimony concerning the meaning of the word "konohiki." We believe the decision of the Supreme Court as to the meaning of the word as an adjective conclusively settled that point (Tr., p. 249).

On page 71 it is said that the surveyor who surveyed the kuleana and designated the surrounding land as "konohiki" was not describing Kioloku and was probably ignorant of its title. And in this connection the case of *Rose v. Yoshimura* is cited. That was the common case of an overlap of awards, and the court merely held that the earlier award must prevail over the later, irrespective of the date of the survey of the land. The case is not in point. The evidence received in the case at bar was relevant both upon reason and authority. The description in the award cannot properly be said to be merely the work of the surveyor. The grantor in a deed could not be heard to say that the description of the land conveyed was not his description, but only that of a surveyor. It is the description of the Land Commission itself. The evidence contained in such old documents is certainly much more reliable than any oral testimony witnesses now living might give on such a subject. For this reason it was expressly held in the case of

In re Pa Pelekane, 21 Haw., 175, 186, that "Land Commission Award 8559 to Kanaina, dated March 31, 1855, describing a piece of land at Lahaina purporting to adjoin Government land which it is claimed is the land in dispute would be admissible if supplemented by testimony showing its location to be as claimed. It would tend to prove the boundary of Pa Pelekane along the line described, and, what perhaps is more important from the standpoint of the Territory, it would go to show that the land in dispute had not been previously awarded by the Land Commission." In that case the Territory successfully urged the rule which we now rely upon. In the case at bar the documentary evidence was supplemented by the testimony of Wright, the surveyor, who testified to the respective situations of the lands and showed the location of L. C. A. 9659 within the Ahupuaa of Kioloku (Ex. 9). The rule also applies to the other documentary evidence referred to on page 74 of appellant's brief.

Assignment No. 6.

This relates to the ruling made by the Supreme Court that the proceedings had upon the petition before the Boundary Commissioner strongly refute the idea that no award of Kioloku had been made to Keohokalole. This point has been amply discussed

therein and was carefully considered by the courts below. So far as Kalakaua's petition is concerned the statement contained therein was offset by the contrary recital in the partition deed to which he was a party. In the proceeding referred to the Government of the monarchy made such a clear admission as to the ownership of the land at the time when its true ownership was doubtless well understood that the courts ought not to tolerate a contrary claim on the part of the present Government made for the purpose of disturbing a peaceable possession so long maintained by Keohokalole's successors in interest under the circumstances shown by the evidence in this case.

The Supreme Court very aptly said (Tr., p. 251): "What took place before the Boundary Commissioner was entirely inconsistent with any other theory than that Kalakaua was recognized by the Boundary Commissioner, the King and the Government as the rightful owner of the property."

On page 82 of the appellant's brief the question is asked, "Who was Martin?" A sufficient answer would be that it is entirely immaterial at this late day who Martin was.

The bald statements made on page 83 of the brief that "There was no power in Mr. Martin to bind the Government;" that "There is no proof that the Hawaiian Government was given notice of the petition

of Kalakaua or took any part in the proceedings," and that the Commissioner "was not required to give notice to the Government that the petition of Kalakaua had been filed," are refuted by the record.

Counsel for the appellant admit (Brief, p. 83) that the Commissioner was required to give notice of the proceeding to the owners of the adjoining lands. The judge of the Land Court correctly said that "The respective owners of the adjoining lands of Honuapo and Kaunamano had a right to be heard lest their lands should be encroached upon by the judgment which would be entered defining the boundaries of Kioloku" (Tr., p. 38). The evidence was uncontradicted that the land of Kaunamano belonged to the Government. Hence the Government, as shown by the Commissioner's record (Tr., p. 104), was notified and appeared by agent, the only manner in which it could appear. The presumption of regularity applies, and after the lapse of more than forty years the record is conclusive evidence that the Government was notified and that Martin was authorized to represent it. The Government cannot stand by for half a century and after the witnesses have died off assert a stale claim and complain that the claimant has not made more specific proof.

We desire to call attention to the rule that where the record of an inferior court declares the ascer-

tainment of the jurisdictional facts the declaration is conclusive.

Raymond v. Bell, 18 Conn., 81, 88.

Pelters v. McClannahan, 52 Ala., 55, 60.

Dyckman v. Mayor, 5 N. Y., 434, 440.

Comstock v. Crawford, 3 Wall., 396, 403.

This rule was applied in Hawaii to proceedings before a Boundary Commissioner in the case of *Keelikolani v. Lunalilo*, 4 Haw., 627, 629, where the court said: "The statute does not point out how parties shall be notified or proof of notification made or recorded. Personal service is not necessary under it. The record recites that all the adjoining owners were notified. This is presumptive proof, and, after being unquestioned for nearly ten years, we must hold it conclusive."

On page 84 of appellant's brief counsel say: "We consider it a great misfortune that we were not allowed to show that at a later date Professor Alexander did become aware of the existence of Kioloku, and classified it as unassigned land." No evidence that Professor Alexander ever classified Kioloku as unassigned land was offered at the trial of this case. Petitioner's Exhibit E for identification, to which reference is made, was rejected because it bore no signature or other evidence of authenticity, and it was in no way connected with Professor Alexander

(Tr., p. 220). No exception was noted to the ruling of the trial judge, nor is there an assignment of error in that connection before this court.

On page 85 of the brief it is said that the attorney general during Kalakaua's reign "held office at his (the King's) pleasure." That is not true as to the time subsequent to July 6, 1887. Article 41 of the constitution granted on that date provided that the cabinet, including the attorney general, "shall be removed by him only upon a vote of want of confidence passed by a majority of all the elective members of the legislature, or upon conviction of felony" (Thurston's Fundamental Law of Hawaii, p. 186). We remember that some able and fearless lawyers held office as attorney general during the period referred to by opposite counsel, and it is a matter of history that by the constitution of 1887 the King's monarchical wings were so severely clipped that thereafter no one had any reason to fear him, and there was no evidence in the case that the mild and jolly King was ever feared by anybody. The suggestion that no attorney general "had the temerity to attack the monarch's deed" has nothing to support it.

The statement made on page 99 of the appellant's brief that "Our records are complete, and there has never been any destruction of public documents in the Hawaiian Islands similar to that in New Mex-

ico," is not sustained by any evidence in the case. It is a matter of history that when Kalakaua was elected King, in 1874, a riot took place in Honolulu, during which the capitol was ransacked. Whether or not any public documents were destroyed at that time is not shown by any evidence in the case.

The case of *Kapuniāi v. Kekupu*, 3 Haw., 560, cited in this connection, has no bearing on the case at bar. The rule concerning the proof of the contents of a lost document has no relation to the presumption of a transfer of title arising out of circumstantial evidence.

Assignment No. 5.

This relates to the observation made by the Supreme Court that the doctrine of the common-law presumption of a lost grant may be invoked in favor of the State as well as against it. The remark, though sustained by authority, was *obiter*, and requires no notice. The discussion in the appellant's brief under this head has no relation to the subject-matter of the assignment.

Assignment No. 10.

This deals with the ruling of the Supreme Court that the case of *Kahoomana v. Minister of Interior* did not abrogate the rule of the common law with

reference to the presumption here discussed. That point has been fully covered above, and need not be further enlarged upon.

Assignments Nos. 1, 2, 3, 4, and 7.

These have all been covered by preceding discussion.

We observe a typographical error on page 253 of the record. In the 5th line from the bottom the word "not" should read "now."

We have shown by indisputable authority that it is not necessary in a case of this kind to convince the court that title by a recorded instrument was in fact acquired by the claimant. The common law presumption is founded upon the inability of the party to prove that, and all that is necessary to show is what the claimant showed in this case, namely, a set of circumstances which is consistent with the theory that title had been acquired from the Government and inconsistent with the theory of continued Government ownership. It would be difficult to imagine a stronger case of that kind than has been made out in the case at bar. The claim set up by the Territory is a stale one, and as such is one which will not commend itself to a court of justice.

In conclusion, we confidently submit that the decision of the Land Court, in so far as it dealt with

facts, was supported by the weight of ample evidence, and so far as it applied rules of law, it was fortified by the decisions of courts of the highest authority. It was upheld by an unanimous Supreme Court. We contend that no error has been shown and that the decree appealed from should be affirmed.

Respectfully submitted,

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Plantation Co., Appellee.

GLOSSARY.

Aina.—Land.

Ahupuaa.—The largest unit of land subject to separate or independent award of title.

Aupuni (noun).—Government.

Aupuni (adjective applied to land).—Government land.

Ili.—The second largest unit of land subject to separate or independent award of title.

Konohiki (noun).—The possessor of a large parcel of land (an ahupuaa or ili). In feudal times, the chief who held under the King; since 1848, the chief to whom the land had been given or awarded.

Konohiki (adjective applied to land).—Land given or awarded to a chief—*i. e.*, “Aina konohiki” (land of a chief) as distinguished from “Aina aupuni” (Government land).

Kuleana.—The smallest unit of land subject to separate or independent award of title.

Mahele.—Division. The Great Mahele was the division of lands made between the King and chiefs, whereby the King surrendered his feudal rights and enabled the chiefs to acquire title in fee to the lands held by them prior to December 10, 1845.

United States
Circuit Court of Appeals
For the Ninth Circuit.

SAMUEL C. PANDOLFO,

Plaintiff in Error,

vs.

BANK OF BENSON, a Corporation et al.,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Arizona.

FILED

FEB - 5 1911

F. G. HILKERTON

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UNITED STATES OF AMERICA,—ss.

District Court of the United States Within and for
the District of Arizona, at Phoenix.

April Term, 1919.

No. 218—PHOENIX.

SAMUEL C. PANDOLFO,

Plaintiff,

vs.

BANK OF BENSON, a Corporation, Bank of
Bisbee, a Corporation, Citizens Bank & Trust
Co., a Corporation, Miners & Merchants
Bank, a Corporation, Buckeye Valley Bank,
a Corporation, Casa Grande Valley Bank, a
Corporation, Bank of Chandler, a Corpora-
tion, Bank of Duncan, a Corporation, Bank
of Douglas, a Corporation, Arizona Central

*Page-number appearing at foot of page of original certified Transcript
of Record

Bank, a Corporation, The Citizens Bank, a Corporation, Glendale State Bank, a Corporation, Security State Bank, a Corporation, Pinal Bank & Trust Co., a Corporation, Old Dominion Com. Co., a Corporation, Merchants & Stock Growers Bank, a Corporation, Holbrook State Bank, a Corporation, Bank of Jerome, a Corporation, Bank of Lowell, a Corporation, Mesa City Bank, a Corporation, Salt River Valley Bank, a Corporation, State Bank of Metcalf, a Corporation, Bank of Miami, a Corporation, Gila Valley Bank & Trust Co., a Corporation, State Bank of Morenci, a Corporation, Santa Cruz Valley Bank & Trust Co., a Corporation, Sonora Bank & Trust Co., a Corporation, Bank of Oatman, a Corporation, The Commercial Bank, a Corporation, Payson Com. & Trust Co., a Corporation, (1) Central Bank of Phoenix, a Corporation, Citizens State Bank, a Corporation, Phoenix Savings Bank & Trust Co., a Corporation, Valley Bank, a Corporation, Bank of Arizona, a Corporation, Commercial Trust & Savings Bank, a Corporation, Yavapai County Savings Bank, a Corporation, Bank of Safford, a Corporation, St. Johns State Bank, a Corporation, San Simon Valley Bank, a Corporation, Bank of Northern Arizona, a Corporation, Bank of Superior, a Corporation, Farmers & Merchants Bank, a Corporation, [3] Citizens Bank a Corporation, Mer-

chants Bank & Trust Co., a Corporation, Southern Arizona Bank & Trust Co., a Corporation, Willcox Bank & Trust Co., a Corporation, Williams State Bank, a Corporation, Bank of Winslow, a Corporation, Arizona State Bank, a Corporation, First National Bank of Clifton, a Corporation, First National Bank of Globe, a Corporation, First National Bank of Douglas, a Corporation, First National Bank of Nogales, a Corporation, National Bank of Arizona, a Corporation, Phoenix National Bank, a Corporation, Prescott National Bank, a Corporation, Tempe National Bank, a Corporation, First National Bank of Tombstone, a Corporation, Arizona National Bank, a Corporation, Consolidated National Bank, a Corporation, First National Bank of Yuma, a Corporation, Yuma National Bank, a Corporation, and Morris Goldwater,

Defendants.

Amended Petition.

Comes now the said plaintiff with leave of the Court first had, and files this his amended petition and alleges:

That the plaintiff is a citizen of the State of Minnesota, residing in the county of Stearns in said State.

That the defendants, Bank of Benson, Bank of Bisbee, Citizens Bank & Trust Co., Miners & Merchants Bank, Buckeye Valley Bank, Casa Grande

Valley Bank, Bank of Chandler, Bank of Duncan, Bank of Douglas, Arizona Central Bank, The Citizens (2) Bank, Glendale State Bank, Security State Bank, Pinal Bank & Trust Co., Old Dominion Com. Co., Merchants & Stock Growers Bank, Holbrook State Bank, Bank of Jerome, Bank of Lowell, Mesa City Bank, Salt River Valley Bank, State Bank of Metcalf, Bank of Miami, Gila Valley Bank & Trust Co., State Bank of Morenci, Santa Cruz Valley Bank & Trust Co., Sonora Bank & Trust Co., Bank of Oatman, The Commercial Bank, Payson Com. & Trust Co., Central Bank of Phoenix, Citizens State Bank, Phoenix, Savings Bank & Trust Co., Valley Bank, Bank of Arizona, Commercial Trust & Savings Bank, Yavapai County Savings Bank, Bank of Safford, St. Johns State Bank, San Simon Valley Bank, Bank of Northern Arizona, Bank of Superior, Farmers & Merchants Bank, Citizens Bank, Merchants Bank & Trust Co., Southern Arizona [4] Bank & Trust Co., Willcox Bank & Trust Co., Williams State Bank, Bank of Winslow and Arizona State Bank are all banking corporations organized under the laws of the State of Arizona, and citizens of said State, with their respective offices and places of business at the cities of Benson, Bisbee, Bisbee, Bisbee, Buckeye, Casa Grande, Chandler, Duncan, Douglas, Flagstaff, Flagstaff, Glendale, Glendale, Florence, Globe, Holbrook, Holbrook, Jerome Lowell, Mesa, Mesa, Metcalf, Miami, Morenci, Morenci, Nogales, Nogales, Oatman, Parker, Payson, Phoenix, Five Points, Phoenix, Phoenix, Phoenix, Prescott, Prescott, Prescott, Safford,

St. Johns, San Simon, Snowflake, Superior, Tempe, Thatcher, Tucson, Tucson, Willcox, Williams, Winslow and Winslow, in the State of Arizona.

The defendants, First National Bank, of Clifton, First National Bank of Globe, First National Bank of Douglas, First National Bank of Nogales, National Bank of Arizona, Phoenix National Bank, Prescott National Bank, Tempe National Bank, First National Bank of Tombstone, Arizona National Bank, Consolidated National Bank, First National Bank, of Yuma, and (3) Yuma National Bank are banking corporations organized under the laws of the United States, conducting their respective banking businesses at the cities of, respectively, Clifton, Globe, Douglas, Nogales, Phoenix, Phoenix, Prescott, Tempe, Tombstone, Tucson, Tucson, Yuma, and Yuma, in the State of Arizona and are all citizens of said State and that the defendant Morris Goldwater, is a resident of the city of Prescott in the State of Arizona and a citizen of said State.

Plaintiff states that at all the times hereinafter mentioned, and long prior thereto, the defendants were, and now are, banking corporations, duly organized and existing as aforesaid, and, as such, have long prior to the matters hereinafter referred to heretofore organized themselves into and at all the times herein mentioned, and now, conduct and operate a voluntary association known as the Arizona Bankers' Association, of which all the defendants, at all the times hereinafter mentioned, and long prior thereto, were members, except the defendant Morris Goldwater, who [5] is an individual and

who at all the times hereinafter mentioned and long prior thereto was, and now is, the secretary of said Arizona Bankers' Association.

Plaintiff further states that said defendants, under said style of Arizona-Bankers' Association, were and are engaged in the business of printing and publishing a certain book and pamphlet called "Proceedings of the Arizona Bankers' Association," and that said defendant, Morris Goldwater, as the secretary of said Arizona Bankers' Association, knowingly acted with the said Arizona Bankers' Association in printing and publishing and distributing the said book and pamphlet so printed and published containing said proceeding of said Arizona Bankers' Association, to the Public.

That said book and pamphlet was at all such times printed and published yearly by said Arizona Bankers' Association assisted by Morris Goldwater, defendant, and was by them largely circulated (4) throughout the States of Arizona, Texas, New Mexico, California, and Illinois, and particularly throughout the entire states of Arizona and New Mexico, where the plaintiff is well known, and throughout the United States of America generally, and was widely read by bankers and business men generally.

Plaintiff states that he has at all times conducted and demeaned himself as an honest and upright citizen of the United States of America, and of the States of New Mexico, Texas and Minnesota, where he had resided during the past few years; that ever since the — day of ———, 1917, he has been employed as the President of the Pan Motor Company,

an automobile manufacturing company organized and existing under and by virtue of the laws of the State of Delaware, and having its principal office in the city of St. Cloud, in the State of Minnesota.

Plaintiff further states that until the commission of the several grievances by the defendants hereinabove set forth he was well reputed, esteemed and accepted by and among his neighbors and acquaintances to whom he was known throughout the states hereinbefore mentioned, and throughout the United States, as a person of good name, fame and credit and as a business man and a corporation officer of honestly integrity and fidelity. [6]

And plaintiff alleges that defendants, well knowing such fact, and intending, wickedly and maliciously, to injure the plaintiff in his good name, fame and credit as an individual and as a business man and corporation officer, and as such, to bring him into public hatred, scorn, ridicule, contempt, infamy and disgrace, and to deprive him of the benefits of public confidence, and to cause it to be believed by his business associates and among good and worthy citizens of the United States that plaintiff had been guilty of corrupt, dishonest, dishonorable and criminal conduct in and about the discharge of his duties as a corporation officer and in and about the transaction of financial matters and as a business man, and in the transaction of insurance business in the State of Texas (in which he had been previously employed); and in (5) order to cause it to be believed by said hereinbefore mentioned persons that the plaintiff had been guilty of criminal conduct and practices,

of embezzlement and theft, and obtaining money under false pretenses in and about the transaction and discharge of financial matters; and in order to cause it to be believed by said persons hereinbefore mentioned, and the public generally, that the plaintiff had been guilty of a violation of the criminal laws of the state of Texas, New Mexico and Arizona, and had been guilty of the crimes of embezzlement, theft, larceny, obtaining money under false pretenses and of violating the insurance laws of the State of Texas, by directly or indirectly unlawfully taking, receiving or retaining moneys legally belonging to other persons, and of writing insurance in the State of Texas in violation of the law; and intending to vex, oppress, impoverish and wholly ruin the plaintiff, did, on or about the — day of May, 1918, in Volume 10 of the book or pamphlet known as the "Proceedings of the Arizona Bankers' Association," publish and cause and procure to be published of *an* concerning the plaintiff a certain false, wicked, malicious, defamatory and libelous article, as follows, to wit: [7]

"The SECRETARY.—Mr. President, before you take up any other matters, I have a letter here that I want to read. This is a letter addressed to the Secretary of the Arizona Bankers' Association and also to the Secretary of the New Mexico Association. It says:

Mr. Morris Goldwater, Secretary State Bankers' Association, Prescott, Arizona.

Mr. J. C. Christensen, Secretary Bankers' Association, Raton, New Mexico.

Gentlemen: You have operating in Arizona and

New Mexico one Mr. S. C. Pandolfo, who recently moved from San Antonio. I am writing you gentlemen with reference to this man Pandolfo, as he is a double-barrelled crook. The Commissioner of Insurance of Texas revoked his license outright and refused him the privilege of writing Insurance in Taxes on account of him continuously violating the law. Out Banking Commissioner forbade State banks from buying paper from this fellow, or in any manner taking obligations in which he was interested.

He has crooked more people and in more ways than most any fellow we have ever had in this part of the country in a long time. I believe that it is only just to the bankers in your State that you tip them off (6) to this fellow. If you do not he is certainly going to hang a lot of them before he is found out. He is one of the crookedest white men I have ever seen. His present address, I understand, is at Tucumcari, and he is promoting some kind of an Automobile Insurance Company, the results of which that he will be getting a lot of money out of the promotion and the company will be broke about the time it shall begin its operation.

Yours very truly,

President.

It is such a letter that I did not care to put it in print and send it out as a warning, as I did not know but what I might be held up and libeled for something, so I thought I would read it here to you all.”

[8]

And, having so published said false, defamatory

and libelous matter of and concerning the plaintiff, the defendants circulated the same and caused it to be circulated among business men, bankers and others throughout the States of Arizona, Texas, New Mexico, California, Illinois and other States of the United States.

Plaintiff alleges that the defendants well knew that said statements so published of and concerning the plaintiff, as aforesaid, were absolutely false and untrue, and that the same were published with the malicious and express intent of defaming and injuring the plaintiff.

Plaintiff further says that said book and pamphlet in which said libelous article was so published as aforesaid is a book and pamphlet of large circulation, as hereinbefore alleged, and is generally considered of great influence and power among banking institutions throughout the United States of America, and that the defendants, the publishers of said book and pamphlet, are reasonable worth more than Fifty Million Dollars (\$50,000,000.00).

WHEREFORE, plaintiff says that, by reason of the premises, he has been brought into public hatred, scorn, ridicule, contempt, infamy and disgrace; has been deprived of the benefits of public confidence, both as an individual and as a corporate (7) employee and officer; has suffered great humiliation and mental paid and anguish, and has grievously suffered in his reputation and has been damaged by the libelous publication so made of and concerning him by the defendants, as aforesaid, in the sum of Five Hundred Thousand Dollars (\$500,000.00) as actual

damages, and in the further sum of Five Hundred Thousand Dollars (\$500,000.00) as punitive damages, for which he prays judgment, with his costs.

JONES, HOCKER, SULLIVAN & AN-
GERT,

ALEXANDER & CHRISTY,

Attorneys for Plaintiff. (8)

[Indorsements]: Amended Petition. Rec'd copy of the within amended petition this 15 day of April, 1919. Armstrong, Lewis & Kramer, Attorneys for Original Defendants. Filed Apr. 15, 1919. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [9]

In the District Court of the United States for the
District of Arizona.

LAW—No. 218—PHOENIX.

SAMUEL C. PANDOLFO,

Plaintiff,

vs.

BANK OF BENSON et al.,

Defendants.

Motions, Demurrers and Answer to Complaint.

Come now the defendants named in the complaint herein, by their attorneys, Armstrong, Lewis & Kramer, and severing as to their defense, separately plead to the complaint of plaintiff herein as follows:

Motions to Strike.

I.

Each defendant moves the Court to strike from line

24, page 5, of the complaint the words "criminal conduct" as surplusage.

II.

Each defendant further moves the Court to strike from the complaint the following words in lines 30, 31 and 32, page 5, and line 1, page 6 of the complaint, to wit: "criminal conduct and practices of embezzlement and theft, and obtaining money under false pretenses in and about the transaction and discharge of financial matters," as surplusage.

III.

Each defendant further moves the Court to strike from the complaint the following words in lines 2, 3 and 4, page 6 of said complaint, to wit: "that the plaintiff had been guilty (1) of the violation of the criminal laws of the state of Texas, New Mexico and Arizona," as surplusage.

IV.

Each defendant further moves the Court to strike from the complaint the following words found in lines 4, 5 and 6, page 6 of the complaint, to wit: "and had been guilty of the crimes of embezzlement, theft, larceny, obtaining money [10] under false pretences", as surplusage.

V.

Each defendant further moves the Court to strike from the complaint the following words found in lines 7, 8 and 9, page 6 of said complaint, to wit: "by directly or indirectly unlawfully taking, receiving or obtaining moneys legally belonging to other persons" as surplusage.

Demurrer.

Without waiving said motions, each defendant separately demurs to said complaint upon the ground that said complaint wholly fails to state facts sufficient to constitute a cause of action as against it.

Wherefore, each defendant prays that said complaint be dismissed as to it and that it recover its costs.

Answer.

Without waiving said motions to strike or said demurrer, the defendants severing in their answer each pleads to the complaint of plaintiff separately as follows:

I.

That the cause of action stated in the complaint did not accrue within one year before the commencement of this action, and is therefore barred by the provisions of paragraph (2) 709, Revised Statutes of Arizona, 1913.

II.

That the cause of action stated in the complaint as to all publications whatsoever, except as to the alleged publication in May, 1918, which publication is not admitted but expressly denied, did not accrue within one year before the commencement of this action and are, and each of them is, therefore, barred by the provisions of paragraph 709, Revised Statutes of Arizona, 1913. [11]

III.

Each defendant, without admitting but, on the contrary, expressly denying, the publication of the

said alleged libelous matter set forth in said complaint, says that prior to May, 1918, the State Securities Commission of the State of Minnesota had, pursuant to the laws of Minnesota in such cases made and provided and in the exercise of its jurisdiction thereunder, issued to a corporation known as the Pan Motor Company an order to show cause why the license of said corporation to sell its stock should not be revoked. That Samuel C. Pandolfo, the plaintiff herein, was at said time the president of said Pan Motor Company. That said Commission, as was its duty to do, had under investigation the character and business record of the said plaintiff, president of said Pan Motor Company, and in the course of said investigation the said Commission requested one Morris Goldwater, of Prescott, Arizona, to give to the said Commission all information in his possession touching the said character and business record of the said Samuel C. Pandolfo to the end that the said Commission might be fully advised in its action upon said order to show cause. That the said Morris Goldwater had in May, 1918, in his possession a copy of the alleged libelous matter set forth in the complaint herein and he, (3) the said Morris Goldwater, believing in the truth of the information so in his possession, furnished to the said State Securities Commission of Minnesota, as was his duty to do, said information and that said Goldwater so furnished said information without any malice whatsoever toward the said plaintiff and without the intent to injure the said plaintiff and in confidence to the said Commission alone without

the intent that anything in said matter so furnished by him as aforesaid should become or be made public.

Each defendant alleges that the furnishing of said copy of said alleged libelous matter set forth in the complaint herein to the said State Securities Commission of Minnesota was at the time thereof unknown to it; that it had no knowledge thereof until the filing of the complaint of plaintiff herein; that it never authorized, directly or indirectly, the furnishing [12] thereof and that it has never ratified the same; that such furnishing of said copy of said alleged libelous matter as aforesaid was not a duty of the said Morris Goldwater as Secretary of the Arizona Bankers' Association and was not within the scope of his duties as Secretary of the Arizona Bankers' Association, and was unknown to the said Arizona Bankers' Association at the time thereof and to and until the filing of the complaint herein and that said Arizona Bankers' Association has never approved or ratified the same.

IV.

Each defendant separately denies that it in any way or at any time whatsoever published the alleged libelous matter set forth in said complaint or any part thereof and denies that it authorized, approved or ratified the said alleged publication thereof. (4)

V.

Each defendant further separately alleges that the Arizona Bankers' Association is a voluntary, unincorporated association, formed by the banks of Arizona in order to promote the general welfare and

usefulness of banks and banking institutions and to secure uniformity of action, together with practical benefits to be derived from personal acquaintance and from the discussion of subjects of importance to the banking and commercial interests of this territory and for the protection against loss by crime. That said association is a nonprofit association. That the entering into of such association by this defendant corporation is the attempted exercise of a power not granted by its charter and therefore *ultra vires* and utterly void. That by the provisions of the constitution and by-laws of Arizona Bankers' Association it is expressly provided as follows:

“Sec. 2. No opinions expressed, principles advocated, theories advanced, or policies suggested by any party or person, however presented, shall be deemed to have had the indorsement of this Association except the question of so indorsing shall have been referred to a standing or special Committee; shall have been reported upon by such [13] Committee, and shall have been specifically voted upon, receiving a majority of the votes of those present at an open session of a Convention of the Association.

This item of the Constitution shall be published in every report of the proceedings of any convention, and where indorsements are given the fact shall be noted in the report of the proceedings in that behalf.”

That during the year 1916 Samuel C. Pandolfo, the plaintiff in the above-entitled action, was at-

tempting to do business in the State of Arizona and that his business reputation and character was a matter of mutual interest and concern to the members of the Arizona Bankers' Association. That prior to the annual meeting of the said Association held at Phoenix, Arizona, November 10 and 11, 1916, said time being more than one year prior to the commencement of this action, and any publication (5) thereat being therefore barred by the provisions of paragraph 709, Revised Statutes of Arizona, 1913, the then Secretary of said Association had received a letter regarding the plaintiff Samuel C. Pandolfo, being the letter set forth in said complaint, and the said Secretary, in reliance upon the mutual relation existing between the said members of said Association, in confidence and for the sole benefit and information of the said members and being reliably informed and believing said letter to truly state the facts, in good faith and in pursuance to duty, without malice or intent to injure the plaintiff, read the said letter to the members then present, but that said letter was not referred to a standing or special Committee, was not reported upon by any Committee and was not voted upon, or in anywise adopted, ratified or approved or made a part of the proceedings of said Association.

Each defendant separately denies that it published or caused or authorized the publication of the said letter as alleged in said complaint or otherwise or at all, and denies that it had any knowledge of the alleged publication until the filing of the complaint

herein and alleges that it never ratified or in any-wise approved the same. [14]

VI.

Without admitting publication, each defendant separately denies that it or the said Arizona Bankers' Association meant or were understood to mean by the alleged libelous matters set forth in the complaint that the plaintiff had been guilty of criminal conduct, or that the plaintiff had been guilty of criminal conduct in practices, of embezzlements and theft, and of obtaining money under false pretences in and about the transaction and discharge of financial matters, or that the plaintiff had been guilty of violation of the criminal laws of the States of Texas, (6) New Mexico and Arizona, or that the plaintiff had been guilty of the crimes of embezzlement, theft, larceny or obtaining money under false pretences, or of directly or indirectly unlawfully taking, receiving or obtaining moneys legally belonging to other persons.

VII.

Each defendant separately denies that prior to the commission of the several grievances alleged in said complaint to have been committed by the defendants, that plaintiff was either well reputed, esteemed or accepted by and among his neighbors or acquaintances as a person of good name, fame or credit, or as a business man or a corporate officer of honesty, integrity or fidelity, and each defendant separately alleges that the plaintiff's reputation, prior to the alleged publications complained of in the complaint herein, was, in the respects aforesaid, bad.

VIII.

Without admitting, but, on the contrary, expressly denying the publication or circulation of the alleged libelous matter set forth in the complaint herein, in further answer and in justification each defendant separately avers that the alleged libelous matter complained of is true.

That on or about June 27, 1916, the Department of Insurance and Banking of the State of Texas, acting by and through its Commissioner, John S. Patterson, revoked all licenses as life insurance agent theretofore granted to Samuel [15] C. Pandolfo, plaintiff herein, thereby revoking the privilege of the said Pandolfo of writing insurance in Texas and that said order was made and entered upon account of continuous violation by the said Pandolfo of the laws of Texas relating (7) to insurance.

That the Department of Insurance and Banking of the State of Texas, acting by and through its said Commissioner, John S. Patterson, on or about the said 27th day of June, 1916, forbade the banks of the State of Texas from buying so-called trust certificates, hereinafter more particularly described, issued by the said Pandolfo.

That the alleged libelous matter charged in the complaint, to wit, that the plaintiff Pandolfo is a crook and that he, the said Pandolfo, has crooked more people in more ways than most any fellow in this part of the country in a long time, was and is true in each and every part thereof, that is to say:

That the said Pandolfo, during the years 1911 and 1912, promoted the Alamo Life Insurance Company.

That the said Pandolfo in various parts of the State of Texas during said times and particularly at and about the cities of San Antonio, Alpino, Fort Stockton and El Paso, Texas, and from divers and sundry persons, amongst others, P. H. Pruett and J. A. Pruett, solicited subscriptions to the capital stock of the said Alamo Life Insurance Company proposed to be organized by the said Pandolfo under the laws of the State of Texas. That each of the defendants separately alleges upon information and belief that the said J. A. Pruett, upon the solicitation of the said Pandolfo, subscribed for Five Thousand Dollars worth of the capital stock of the Alamo Life Insurance Company, paying 25% down represented by Two Hundred Fifty Dollars cash and his promissory note for One Thousand Dollars, and that the said Pandolfo claimed the said amount of 25% of the said subscription as organization fees and that the said Pruett lost in said transaction Eight Hundred Fifty Dollars, no part of which (8) has ever been returned. That said P. H. Pruett, at the solicitation of the said Pandolfo, subscribed for Twenty-five [16] Thousand Dollars worth of the capital stock of the said Alamo Life Insurance Company and executed and delivered to the said Pandolfo his note therefor, which note has never been paid. That said company was never incorporated.

On information and belief that on or about the 7th day of July, 1915, one Felix P. Miller of El Paso, Texas, then was and now is, a practicing physician and surgeon in said city, was approached by the said plaintiff Pandolfo and that at the sollicita-

tion of the said Pandolfo the said Felix P. Miller executed and delivered his promissory note in favor of the said Pandolfo, said note being in the sum of Five Hundred Dollars and bearing interest at the rate of 8% per annum and maturing 6 months after date. That the said note was taken by the said Pandolfo and negotiated by him to the Rio Grande Valley Bank and Trust Company of El Paso, Texas. That in consideration of the making of said note the said Pandolfo agreed with the said Miller as follows: That the sum of \$227.25 was to be deposited in the Rio Grande Valley Bank and Trust Company of El Paso, Texas, at 4% interest, the interest accruing thereon to be applied to the credit of the said Miller until such time as the said interest equaled the sum of \$272.75, or a sum sufficient when added to the principal sum of \$227.25 on deposit to return to Dr. Felix P. Miller the original sum of \$500.00. That the remaining sum of \$272.25, which the said Pandolfo realized through the discounting of the note of the said Miller, was to be devoted by the said Pandolfo to the establishing in El Paso, Texas, of an agency representing three large life insurance companies, said agency to engage in the writing of life insurance. That the said Miller was to be appointed (9) Chief Medical Examiner for the life insurance agency to be formed by the said Pandolfo, the life insurance companies represented by said agency to pay said Miller regular fees for conducting physical examinations of applicants for life insurance in the respective companies. That in addition to the regular fees for such examinations to

be paid by said companies the said Miller was to receive as part remuneration for his services 5% of the total profits accruing to the life insurance [17] agency through commissions received from the writing of life insurance. That the payment of said 5% of the total profits of the agency was to be secured by a lien on the capital stock of the agency and to be further secured by a lien on commissions earned by the said Pandolfo and a further lien upon the life insurance carried by the said Pandolfo. That the said Pandolfo accepted the sum of \$272.75 but failed and neglected to perform any of the agreements upon his part to be performed, and that the excuse given by the said Pandolfo for such failure was the statement of the said Pandolfo that the Commissioner of Insurance of Texas would not permit the founding of such a business and the further statement that the Commissioner of Banking of Texas required the bank to get rid of such deposits. That the said Miller has paid and discharged the said note, negotiated to the Rio Grande Valley Bank and Trust Company as aforesaid, long since. That although repeated requests have been made by the said Miller to the said Pandolfo for the repayment to him of the sum of \$272.75 interest, the said Pandolfo has refused and neglected to repay said sum or any part thereof.

That during the years 1911 to 1915, inclusive, the said plaintiff, S. C. Pandolfo, conducted at San Antonio, Texas, the S. C. Pandolfo Sales Agency for the purpose of writing life insurance throughout

the State of Texas and adjacent (10) states. Upon information and belief that the said S. C. Pandolfo had during said period general agency contracts with the following life insurance companies: The Cherokee Life Insurance Company of Rome, Georgia, The Great Republic Life Insurance Company of Los Angeles, California, and the Independent Life Insurance Company. That for the purpose of assisting in the financing of the Pandolfo Sales Agency said Pandolfo caused to be issued so-called trust certificates in the following form, to wit:

“TRUST FUND CERTIFICATE.

Number	Dollars. [18]
95	\$250

WHEREAS, S. C. Pandolfo of San Antonio, Texas, has a General Agency Contract with the following companies:

The Cherokee Life Insurance Company, of Rome, Georgia, covering Arizona, New Mexico, and Texas.

The Great Republic Life Insurance Company of Los Angeles, California, covering New Mexico, Oklahoma and Texas.

The Independent Life Insurance Company, of Nashville, Tennessee, covering Arizona, New Mexico, Oklahoma and Texas.

And

WHEREAS, S. C. Pandolfo is desirous of extending and further developing his Agency organization, and materially increasing his production, and for that purpose needs a larger capital, he is

offering for sale Two Hundred (200) Certificates,
And

WHEREAS — of — County of — State
of — has been appointed in —.

(Territory)

THEREFORE S. C. Pandolfo does hereby sell
to the said — — certificates, for (\$—) —
Dollars.

These certificates shall participate in a fund to
be established as follows: On all written, delivered
and paid for business produced after October 1st,
1914, for (10) years, One Dollar (\$1.00) per thou-
sand will be set aside as a special Trust Fund, and
paid to Geo. D. Campbell, San Antonio, Texas,
Trustee, by S. C. Pandolfo on the 10th of every
month, (11) for business thus produced the pre-
ceding month, for equal distribution among the 200
certificates. Term policies to figure one-half ($\frac{1}{2}$).
The fund so created to be divided immediately by
said Trustee into two hundred equal parts, one of
which will be remitted immediately to the regis-
tered holder of this [19] certificate.

Special Bonus.

The holder hereof will receive a commission on
the first year's premiums of 5% on all written and
paid for business, produced by agents appointed by
reason of the efforts and influence of the holder
hereof, the commission to be paid by the Trustees
as above outlined.

Special Guarantee.

If S. C. Pandolfo should retire from the Life In-
surance business, or die, he binds himself, his estate,

heirs and assigns to redeem this certificate at a price that will net the holder par (\$250.00) Two Hundred Fifty Dollars, the price paid for it, and a profit of twenty per cent (20%) per annum from date of issue. For and in consideration of this guarantee, S. C. Pandolfo has the option to purchase at any time within (10) years, this certificate at a price that will net the holder par (\$250.00) Two Hundred Fifty Dollars, the price paid for it, and twenty per cent (20%) per annum from date of issue.

This certificate is issued this — day of —, 19—, at —, State of Texas, and signed without hands and seals.

Registered.

_____,
Trustee.

Seal.”

Upon information and belief that the said Trust Fund mentioned in the said certificates was in fact never created.

That certain of said certificates, or like certificates, or similar certificates, purported to bear the guarantee of the Commonwealth Trust Company of Houston, Texas, and were so caused to be guaranteed by the said Pandolfo for the purpose of adding thereto a fictitious security thereby increasing their salability to the general public. That the said Commonwealth Trust Company was then and prior to the time of the issuance of the said certificates so guaranteed as aforesaid in bad repute

financially and that its said reputation was known or should have been known to the said Pandolfo at and [20] (12) before the sale of said certificates to the persons hereinafter mentioned and to the public generally. That the said Pandolfo sold certain of said certificates to divers and sundry persons, to these, amongst others—S. J. Blythe, A. L. Vidaurri, R. K. Minis, J. S. Penn, J. F. Halsell, T. C. Mann, J. K. Thompson, S. Simon, W. S. Monkhouse, Louis Knippa, W. S. Kelley, C. E. Freeman and Lester H. Barnhill, and collected therefrom as the purchase price thereof amounts aggregating many thousands of dollars and that shortly thereafter the said Pandolfo ceased making payments of the dividends thereon, contrary to the agreements in said certificates contained, and wholly ignored all obligations by him assumed thereunder and the said several purchasers thereof were compelled either to commence and prosecute suits for the collection of the moneys paid thereon or to accept from the said Pandolfo settlement of their several claims arising out of and from the purchase of said certificates varying sums less than the amounts so paid by the purchasers thereon and guaranteed to be repaid by the terms of said certificates.

IX.

That in mitigation of any damages to which the plaintiff might otherwise appear to be entitled by reason of the alleged publication of the claimed libelous matter set forth in said complaint, each defendant separately repeats and renews all and

singular the matters stated in paragraph VIII hereof and will give evidence thereof as a partial defense in mitigation of damages as well as in justification.

X.

Each defendant separately denies each and every allegation in the complaint contained not herein expressly admitted. (13)

WHEREFORE, having fully answered, each defendant separately prays judgment that the said complaint be dismissed [21] as to it and that it recover its costs incurred herein.

Dated: March 15, 1919.

ARMSTRONG, LEWIS & KRAMER,

Attorneys for the Several Defendants.

[Endorsements]: Motions, Demurrers and Answer to Complaint. Copy recd. this 15th day of March, 1919. Alexander & Christy. Filed March 15th, 1919. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [22]

In the District Court of the United States, for the
District of Arizona.

LAW—No. 218—PHOENIX.

SAMUEL C. PANDOLFO,

Plaintiff,

vs.

BANK OF BENSON et al.,

Defendants.

Motions, Demurrers and Answer of Morris Goldwater to the Amended Complaint.

Comes now the defendant, Morris Goldwater, named in the amended complaint herein, by his attorneys, Armstrong, Lewis & Kramer, and severing as to his defense separately pleads to the said complaint of plaintiff herein as follows:

Motions to Strike.**I.**

Defendant moves the Court to strike from line 29, page 5 of the complaint the words "criminal conduct" as surplusage.

II.

Defendant further moves the Court to strike from the complaint the following words in lines 2, 3, 4 and 5, page 6, of the complaint, to wit: "criminal conduct and practices of embezzlement and theft, and obtaining money under false pretenses in and about the transaction and discharge of financial matters," as surplusage.

III.

Defendant further moves the Court to strike from the complaint the following words in lines 6, 7, and 8, page 6, of said complaint, to wit: "that the plaintiff had been guilty of the violation of the criminal laws of the States of Texas, New Mexico and Arizona" as surplusage. (1)

IV.

Defendant further moves the Court to strike from the complaint the following words found in lines 8, 9 and 10, page 6, of said complaint, to wit:

“and had been guilty of the [23] crimes of embezzlement, theft, larceny, obtaining money under false pretenses” as surplusage.

V.

Defendant further moves the Court to strike from the complaint the following words found in lines 11 and 12, page 6, of said complaint, to wit: “by directly or indirectly unlawfully taking, receiving or obtaining moneys legally belonging to other persons” as surplusage.

Plea in Abatement.

Defendant Morris Goldwater, separately pleads that at the commencement of this action there was and now is another action pending in the District Court of the United States within and for the District of Arizona between the same parties as this action and for the same cause as that set forth in the complaint herein.

WHEREFORE, defendant prays that said action abate as to him and that he be dismissed hence with his costs.

Demurrer.

Defendant Morris Goldwater, separately demurs to said amended complaint upon the ground that said complaint wholly fails to state facts sufficient to constitute a cause of action as against him.

WHEREFORE, defendant prays that said complaint be dismissed as to him and that he recover his costs.

Answer.

Defendant Morris Goldwater, severing in his answer, pleads separately as follows:

I.

That the cause of action stated in the complaint did not accrue within one year before the commencement of this action, and is therefore barred by the provisions of paragraph 709, Revised Statutes of Arizona, 1913.

II.

That the cause of action stated in the complaint as to all publications whatsoever, except as to the alleged publication in May, 1918, which publication is not admitted but expressly [24] denied, did not accrue within one year before the commencement of this action and are, and each of them is, therefore, barred by the provisions of paragraph 709, Revised Statutes of Arizona, 1913.

III.

Defendant, without admitting, but, on the contrary, expressly denying, the publication of the said alleged libelous matter set forth in said complaint, says that prior to May, 1918, the State Securities Commission of the State of Minnesota had, pursuant to the laws of Minnesota in such cases made and provided and in the exercise of its jurisdiction thereunder, issued to a corporation known as the Pan Motor Company an order to show cause why the license of said corporation to sell stock should not be revoked. That Samuel C. Pandolfo, the plaintiff herein, was at said time the president of said Pan Motor Company, and in the course of said investigation the said Commission requested this defendant to give to the said Commission all information in his possession touching

the said character and business record of the said Samuel C. Pandolfo to the end that the said Commission might be fully advised in its action upon said order to show cause. That the said Morris Goldwater had in May, 1918, in his possession a copy of the alleged libelous matter set forth in the complaint herein and he, the said Morris Goldwater, believing in the truth of the information so in his possession, furnished to the said State Securities Commission of Minnesota, as was his duty to do, said information, and that said Goldwater so furnished said information without any malice whatsoever toward the said plaintiff and without the intent to injure the said plaintiff and in confidence to the said Commission alone, without the intent that anything in said matter so furnished by him as aforesaid should become or be made public.

(3) [25]

IV.

Defendant separately denies that he in any way or at any time whatsoever published the alleged libelous matter set forth in said complaint or any part thereof.

V.

Defendant further separately alleges that the Arizona Bankers' Association is a voluntary, unincorporated association, formed by the banks of Arizona in order to promote the general welfare and usefulness of banks and banking institutions and to secure uniformity of action, together with practical benefits to be derived from personal acquaintance and from the discussion of subjects of import-

ance to the banking and commercial interests of this territory and for the protection against loss by crime. That said association is a non-profit association. That the entering into of such association by this defendant corporation is the attempted exercise of a power not granted by its charter and therefore *ultra vires* and utterly void. That by the provisions of the constitution and by-laws of the Arizona Bankers' Association it is expressly provided as follows:

“Sec. 2. No opinions expressed, principles advocated, theories advanced, or politics suggested by any party or person, however presented, shall be deemed to have had the indorsement of this Association except the question of so indorsing shall have been referred to a standing or special Committee; shall have been reported upon by such Committee, and shall have been specifically voted upon receiving a majority of the votes of those present at an open session of a Convention of the Association.

This item of the Constitution shall be published in every report of the proceedings of any convention, and where indorsements are given the fact shall be noted in the report of the proceedings in that behalf.”

That during the year 1916 Samuel C. Pandolfo, the plaintiff in the above-entitled action, was attempting to do business in the State of Arizona and that his business reputation and character was a matter of mutual interest and concern to the members of the Arizona Bankers' Association. That

prior to the annual meeting of the said Association held at Phoenix, Arizona, [26] November 10 and 11, 1916, said time being more than one year prior to the commencement of this action, and any publication thereat being therefore barred by the provisions of paragraph 709, Revised Statutes of Arizona, 1913, the then Secretary of said Association had received a letter regarding the plaintiff Samuel C. Pandolfo, being the letter set forth in said complaint, and the said Secretary, in reliance upon the mutual relation existing between the said members of said Association, in confidence and for the sole benefit and information of the said members and being reliably informed and believing said letter to truly state the facts, in good faith and in pursuance to duty, without malice or intent to injure the plaintiff, read the said letter to the members then present, but that said letter was not referred to a standing or special Committee, was not reported upon by any Committee and was not voted upon, or in any wise adopted, ratified or approved or made a part of the proceedings of said Association.

Defendant separately denies that he published or caused or authorized the publication of the said letter as alleged in said complaint or otherwise or at all, and denies that he had any knowledge of the alleged publication until the filing of the complaint herein, and alleges that he never ratified or in any wise approved the same.

VI.

Without admitting publication, defendant separately denies that he or the said Arizona Bankers'

Association meant or were understood to mean by the alleged libelous matters set forth in the complaint that the plaintiff had been guilty of criminal conduct, or that the plaintiff had been guilty of criminal conduct in practices, of embezzlements and theft, and of obtaining money under false pretenses in and about the transaction and discharge of financial matters, or that the plaintiff had been guilty of violation of the criminal laws of the States of Texas, New Mexico and Arizona, or that the plaintiff had been guilty of the crimes of embezzlement, theft, larceny or obtaining money under false pretenses, or of directly [27] or indirectly unlawfully taking, receiving or obtaining moneys legally belonging to other persons.

VII.

Defendant separately denies that prior to the commission of the several grievances alleged in said complaint to have been committed by the defendant, that plaintiff was either well reputed, esteemed or accepted by and among his neighbors or acquaintances as a person of good name, fame or credit, or as a business man or a corporate officer of honesty, integrity or fidelity, and each defendant separately alleges that the plaintiff's reputation, prior to the alleged publication complained of in the complaint herein, was, in the respects aforesaid, bad.

VIII.

Without admitting, but, on the contrary, expressly denying the publication or circulation of the alleged libelous matter set forth in the complaint herein, in further answer and in justification defendant sepa-

rately avers that the alleged libelous matter complained of is true.

That on or about June 27, 1916, the Department of Insurance and Banking of the State of Texas, acting by and through its Commissioner, John S. Patterson, revoked all licenses as life insurance agent theretofore granted to Samuel C. Pandolfo, plaintiff herein, thereby revoking the privilege of the said Pandolfo of writing insurance in Texas and that said order was made and entered upon account of continuous violation by said Pandolfo of the laws of Texas relating to insurance.

That the Department of Insurance and Banking of the State of Texas, acting by and through its said Commissioner, John S. Patterson, on or about the said 27th day of June, 1916, forbade the banks of the State of Texas from buying so-called trust certificates, hereinafter more particularly described, issued by said Pandolfo.

That the alleged libelous matter charged in the complaint, to wit, that the plaintiff Pandolfo is a crook and that [28] he, the said Pandolfo, has crooked more people in more ways than most any fellow in this part of the country in a long time, was and is true in each and every part thereof, that is to say,

That the said Pandolfo, during the years 1911 and 1912, promoted the Alamo Life Insurance Company. That the said Pandolfo in various parts of the State of Texas during said times and particularly at and about the cities of San Antonio, Alpino, Fort Stockton and El Paso, Texas, and from divers and sundry

persons, amongst others, P. H. Pruett and J. A. Pruett, solicited subscriptions to the capital stock of the said Alamo Life Insurance Company proposed to be organized by the said Pandolfo under the laws of the State of Texas. That each of the defendants separately alleges upon information and belief that the said J. A. Pruett, upon the solicitation of said Pandolfo, subscribed for Five Thousand Dollars worth of the capital stock of the Alamo Life Insurance Company, paying 25% down represented by Two Hundred Fifty Dollars cash and his promissory note for One Thousand Dollars, and that the said Pandolfo claimed the said amount of 25% of the said subscriptions as organization fees and that the said Pruett lost in said transaction Eight Hundred Fifty Dollars, no part of which has ever been returned. That said P. H. Pruett, at the solicitation of said Pandolfo, subscribed for Twenty-five Thousand Dollars worth of the capital stock of the said Alamo Life Insurance Company, and executed and delivered to the said Pandolfo his note therefor, which note has never been paid. That said company was never incorporated.

On information and belief that on or about the 7th day of July, 1915, one Felix P. Miller of El Paso, Texas, then was and now is, a practicing physician and surgeon in said city, was approached by the said plaintiff Pandolfo and that at the solicitation of said Pandolfo the said Felix P. Miller executed and delivered his promissory note in favor of the said Pandolfo, said note being in the sum of Five Hundred Dollars and bearing interest at the rate of 8%

per annum and maturing 6 months after date. [29] That the said note was taken by the said Pandolfo and negotiated by him to the Rio Grande Valley Bank and Trust Company of El Paso, Texas. That in consideration of the making of said note the said Pandolfo agreed with the said Miller as follows: That the sum of \$227.25 was to be deposited in the Rio Grande Valley Bank and Trust Company of El Paso, Texas, at 4% interest, the interest accruing thereon to be applied to the credit of the said Miller until such time as the said interest equalled the sum of \$272.75, or a sum sufficient when added to the principal sum of \$227.25 on deposit to return to Dr. Felix P. Miller the original sum of \$500.00. That the remaining sum of \$272.75, which the said Pandolfo realized through the discounting of the note of the said Miller, was to be devoted by the said Pandolfo to the establishing in El Paso, Texas, of an agency representing three large life insurance companies, said agency to engage in the writing of life insurance. That the said Miller was to be appointed Chief Medical Examiner for the life insurance agency to be formed by the said Pandolfo, the life insurance companies represented by said agency to pay said Miller regular fees for conducting physical examinations of applicants for life insurance in the respective companies. That in addition to the regular fees for such examinations to be paid by said companies the said Miller was to receive as part remuneration for his services 5% of the total profits accruing to the life insurance agency through commissions received from the writing of life insurance.

That the payment of said 5% of the total profits of the agency was to be secured by a lien on the capital stock of the agency and to be further secured by a lien on commissions earned by the said Pandolfo and a further lien upon the life insurance carried by the said Pandolfo. That the said Pandolfo accepted the sum of \$272.75 but failed and neglected to perform any of the agreements upon his part to be performed, and that the excuse given by the said Pandolfo for such failure was the statement of the said Pandolfo that the Commissioner of Insurance of Texas would not permit the founding of such a business and the further statement that the Commissioner of Banking of Texas required the bank to get rid of such deposits. That the said Miller has paid and discharged [30] the said note, negotiated to the said Rio Grande Valley Bank and Trust Company as aforesaid, long since. That although repeated requests have been made by the said Miller to the said Pandolfo for the repayment to him of the sum of \$272.75, interest, the said Pandolfo has refused and neglected to repay said sum or any part thereof.

That during the years 1911 to 1915, inclusive, said plaintiff, S. C. Pandolfo, conducted at San Antonio, Texas, the S. C. Pandolfo Sales Agency for the purpose of writing life insurance throughout the State of Texas and adjacent states. Upon information and belief that the said S. C. Pandolfo had during said period general agency contracts with the following life insurance companies: The Cherokee Life Insurance Company of Rome, Georgia; The Great Re-

public Life Insurance Company of Los Angeles, California, and the Independent Life Insurance Company. That for the purpose of assisting in the financing of the Pandolfo Sales Agency said Pandolfo caused to be issued so-called trust certificates in the following form, to wit:

“TRUST FUND CERTIFICATE.

Number	Dollars
95	\$250

WHEREAS, S. C. Pandolfo of San Antonio, Texas, has a General Agency Contract with the following companies:

The Cherokee Life Insurance Company of Rome, Georgia, covering Arizona, New Mexico and Texas.

The Great Republic Life Insurance Company of Los Angeles, California, covering New Mexico, Oklahoma and Texas.

The Independent Life Insurance Company, of Nashville, Tennessee, covering Arizona, New Mexico, Oklahoma and Texas,

And

WHEREAS, S. C. Pandolfo is desirous of extending and further developing his Agency organization, and materially increasing his production, and for that purpose needs a larger capital, he is offering for sale Two Hundred (200) Certificates,

And

WHEREAS — of — County of — [31]
State of — has been appointed in —.

(Territory)

THEREFORE S. C. Pandolfo does hereby sell to

the said ——— certificates, for (\$——) ———Dollars.

These certificates shall participate in a fund to be established as follows: On all written, delivered and paid for business produced after October 1st, 1914, for ten (10) years, One Dollar (\$1.00) per thousand will be set aside as a special Trust Fund, and paid to Geo. D. Campbell, San Antonio, Texas, Trustee, by S. C. Pandolfo on the 10th of every month, for business thus produced the preceding month, for equal distribution among the 200 certificates. Term policies to figure one-half ($\frac{1}{2}$). The fund so created to be divided immediately by said Trustee into two hundred equal parts, one of which will be remitted immediately to the registered holder of this certificate.

SPECIAL BONUS.

The holder hereof will receive a commission on the first year's premiums of 5% on all written and paid for business, produced by agents appointed by reason of the efforts and influence of the holder hereof, the commission to be paid by the Trustee as above outlined.

SPECIAL GUARANTEE.

If S. C. Pandolfo should retire from the life insurance business, or die, he binds himself, his estate, heirs and assigns to redeem this certificate at a price that will net the holder par (\$250.00) Two Hundred Fifty Dollars, the price paid for it, and a profit of twenty per cent (20%) per annum from date of issue. For and in consideration of this guarantee, S. C. Pandolfo has the option to purchase at any time

within ten (10) years, this certificate at a price that will net the holder par (\$250.00) Two Hundred Fifty Dollars, the price paid for it, and twenty per cent (20%) per annum from date of issue.

This certificate is issued this —— day of ——, 19——, at ——, State of Texas, and signed with our hands and seals.

_____.

Registered:

Trustee.

Seal" [32]

Upon information and belief that the said Trust Fund mentioned in the said certificates was in fact never created.

That certain of said certificates, or like certificates, or similar certificates, purported to bear the guarantee of the Commonwealth Trust Company of Houston, Texas, and were so caused to be guaranteed by the said Pandolfo for the purpose of adding thereto a fictitious security thereby increasing their salability to the general public. That the said Commonwealth Trust Company was then and prior to the time of the issuance of the said certificates so guaranteed as aforesaid in bad repute financially and that its said reputation was known or should have been known to the said Pandolfo at and before the sale of said certificates to the persons hereinafter mentioned and to the public generally. That the said Pandolfo sold certain of said certificates to divers and sundry persons, to these, amongst others: S. J. Blythe, A. L. Vidaurri, R. K. Minis, J. S. Penn, J. F. Halsell, T. C.

Mann, J. K. Thompson, S. Simon, W. S. Monkhouse, Louis Knippa, W. S. Kelley, C. E. Freeman and Lester H. Barnhill, and collected therefrom as the purchase price thereof amounts aggregating many thousands of dollars and that shortly thereafter the said Pandolfo ceased making payments of the dividends thereon, contrary to the agreements in said certificates contained, and wholly ignored all obligations by him assumed thereunder and the said several purchasers thereof were compelled either to commence and prosecute suits for the collection of the moneys paid thereon or to accept from the said Pandolfo settlement of their several claims arising out of and from the purchase of said certificates varying sums less than the amounts so paid by the purchasers thereon and guaranteed to be repaid by the terms of said certificates.

IX.

That in mitigation of any damages to which the plaintiff might otherwise appear to be entitled by reason of the alleged publication of the claimed libelous matter set forth in said complaint, defendant separately repeats and renews all and singular the matters stated in paragraph VIII hereof and will [33] give evidence thereof as a partial defense in mitigation of damages as well as in justification.

X.

Defendant separately denies each and every allegation not herein expressly admitted.

WHEREFORE, having fully answered, defendant separately prays judgment that the said com-

plaint be dismissed as to him and that he recover his costs incurred herein.

Dated: March 15, 1919.

ARMSTRONG, LEWIS & KRAMER,
Attorneys for the Defendant Morris Goldwater.

[Endorsements]: Motions, Demurrers and Answer of Morris Goldwater to the Amended Complaint. Received copy of the within this 9th day of May, 1919. Alexander & Christy, Attys. for Plaintiff. Filed May 9, 1919. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [34]

At a special term, to wit, the special February, 1920, term of the United States District Court for the District of Arizona, held in the courtroom of said court in the Federal Building, in the city of Phoenix, State and District of Arizona, on Tuesday, the 9th day of March, A. D. 1920. Honorable DAVID P. DYER, District Judge for the Eastern District of Missouri, Specially Assigned, Presiding.

(Minute Entry—March 9, 1920.)

No. L-218.—PHOENIX.

SAMUEL C. PANDOLFO,

Plaintiff,

vs.

BANK OF BENSON, a Corporation, Bank of Bisbee, a Corporation, Citizens Bank & Trust Co., a Corporation, Miners & Merchants Bank,

a Corporation, Buckeye Valley Bank, a Corporation, Casa Grande Valley Bank, a Corporation, Bank of Chandler, a Corporation, Bank of Duncan, a Corporation, Bank of Douglas, a Corporation, Arizona Central Bank, a Corporation, The Citizens Bank, a Corporation, Glendale State Bank, a Corporation, Security State Bank, a Corporation, Pinal Bank & Trust Co., a Corporation, Old Dominion Com. Co., a Corporation, Merchants & Stock Growers Bank, a Corporation, Holbrook State Bank, a Corporation, Bank of Jerome, a Corporation, Bank of Lowell, a Corporation, Mesa City Bank, a Corporation, Salt River Valley Bank, a Corporation, State Bank of Metcalf, a Corporation, Bank of Miami, a Corporation, Gila Valley Bank & Trust Co., a Corporation, State Bank of Morenci, a Corporation, Santa Cruz Valley Bank & Trust Co., a Corporation, Sonora Bank & Trust Co., a Corporation, Bank of Oatman, a Corporation, The Commercial Bank, a Corporation, Payson Com. & Trust Co., a Corporation [35] Central Bank of Phoenix, a Corporation, Citizens State Bank, a Corporation, Phoenix Savings Bank & Trust Co., a Corporation, Valley Bank, a Corporation, Bank of Arizona, a Corporation, Commercial Trust & Savings Bank, a Corporation, Yavapai County Savings Bank, a Corporation, Bank of Safford, a Corporation, St. Johns State Bank, a Corporation, San Simon

Valley Bank, a Corporation, Bank of Northern Arizona, a Corporation, Bank of Superior, a Corporation, Farmers & Merchants Bank, a Corporation, Citizens Bank, a Corporation, Merchants Bank & Trust Co., a Corporation, Southern Arizona Bank & Trust Co., a Corporation, Willcox Bank & Trust Co., a Corporation, Williams State Bank, a Corporation, Bank of Winslow, a Corporation, Arizona State Bank, a Corporation, First National Bank, of Clifton, a Corporation, First National Bank of Globe, a Corporation, First National Bank of Douglas, a Corporation, First National Bank of Nogales, a Corporation, National Bank of Arizona, a Corporation, Phoenix National Bank, a Corporation, Prescott National Bank, a Corporation, Tempe National Bank, a Corporation, First National Bank of Tombstone, a Corporation, Arizona National Bank, a Corporation, Consolidated National Bank, a Corporation, First National Bank of Yuma, a Corporation, Yuma National Bank, a Corporation, and Morris Goldwater, Defendants.

Minutes of Court—March 9, 1920—Order Granting Motion to Strike and Sustaining Demurrer.

The defendants' motion to strike certain portions of the plaintiff's complaint herein, and defendants' demurrer to said complaint, coming on regularly for hearing on this date, come now, Messrs. Lewis and Bullard, attorneys for the defendants, and Messrs. Alexander and Christy, attorneys for the plaintiff.

Thereupon said motion and demurrer were argued by respective counsel and submitted to the Court, and the same having been duly considered by the Court,—

IT IS ORDERED that said motion to strike be granted and the said demurrer sustained, and that plaintiff be given until the 17th day of March, 1920, to amend his complaint herein. [36]

UNITED STATES OF AMERICA.

District Court of the United States, District of
Arizona.

No. 218—(PHOENIX).

SAMUEL C. PANDOLFO,

Plaintiff,

vs.

BANK OF BENSON, a Corporation, et al.,

Defendants.

Notice of Motion for Judgment.

To Samuel C. Pandolfo and Alexander & Christy,
Attorneys for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that you having failed to amend your complaint in the above-entitled action within the time prescribed by the Judge of the above-entitled court, that the defendants herein and each of them will upon the first motion day of the above-entitled court move the above-entitled court and the Judge thereof that judgment be rendered in favor of said defendants and against the plaintiff herein upon the pleadings and the record

on file in said cause, a copy of which motion is hereunto annexed.

ARMSTRONG, LEWIS & KRAMER,
BULLOCK & JACOBS,

Attorneys for Defendants. [37]

UNITED STATES OF AMERICA.

District Court of the United States, District of
Arizona.

No. 218 (PHOENIX).

SAMUEL C. PANDOLFO,

Plaintiff,

vs.

BANK OF BENSON, a Corporation, Bank of Bisbee, a Corporation, Citizens Bank & Trust Company, a Corporation, Miners & Merchants Bank, a Corporation, Buckeye Valley Bank, a Corporation, Bank of Chandler, a Corporation, Casa Grande Valley Bank, a Corporation, Bank of Duncan, a Corporation, Bank of Douglas, a Corporation, Arizona Central Bank, a Corporation, The Citizens Bank, a Corporation, Glendale State Bank, a Corporation, Security State Bank, a Corporation, Pinal Bank & Trust Company, a Corporation, Old Dominion Commercial Company, a Corporation, Merchants & Stock Growers Bank, a Corporation, Holbrook State Bank, a Corporation, Bank of Jerome, a Corporation, Bank of Lowell, a Corporation, Mesa City

Bank, a Corporation, Salt River Valley Bank, a Corporation, State Bank of Metcalf, a Corporation, Bank of Miami, a Corporation, Gila Valley Bank & Trust Company, a Corporation, State Bank of Morencia, a Corporation, Santa Cruz Valley Bank & Trust Company, a Corporation, Sonora Bank & Trust Company, a Corporation, Bank of Oatman, a Corporation, The Commercial Bank, a Corporation, Payson Commercial & Trust Company, a Corporation, Central Bank of Phoenix, a Corporation, Citizens State Bank, a Corporation, Phoenix Savings Bank & Trust Company, a Corporation, Valley Bank, a Corporation, Bank of Arizona, a Corporation, Commercial Trust & Savings Bank, a Corporation, Yavapai County Savings Bank, a Corporation, Bank of Safford, a Corporation, St. Johns State Bank, a Corporation, San Simon Valley Bank, a Corporation, Bank of Northern Arizona, a Corporation, Bank of Superior, a Corporation, Farmers & Merchants Bank, a Corporation, Citizens Bank, a Corporation, Merchants Bank & Trust Company, a Corporation, Southern Arizona Bank & Trust Company, a Corporation, Willcox Bank & Trust Company, a Corporation, Williams State Bank, a Corporation, Bank of Winslow, a Corporation, Arizona State Bank, a Corporation, First National Bank of Clifton, a Corporation, First National Bank of Globe, a Corporation, First National Bank

of Douglas, a Corporation, First National Bank of Nogales, a Corporation, [38] National Bank of Arizona, a Corporation, Phoenix National Bank, a Corporation, Prescott National Bank, a Corporation, Tempe National Bank, a Corporation, First National Bank of Tombstone, a Corporation, Arizona National Bank, a Corporation, Consolidated National Bank, a Corporation, First National Bank of Yuma, a Corporation, and Yuma National Bank, a Corporation,

Defendants.

Defendants' Motion for Judgment.

WHEREAS, the defendants in the above-entitled action filed their demurrer to plaintiff's complaint in the above-entitled action, and a motion to strike certain portions of said complaint; and

WHEREAS, on the 9th day of March, 1920, said demurrer and said motion came on regularly to be heard in the above-entitled court, and on the hearing thereof Honorable David P. Dyer, the presiding Judge of the above-entitled Court, sustained said demurrer to plaintiff's complaint, and granted said motion to strike certain portions of plaintiff's complaint, and at the time of sustaining said demurrer and granting said motion to strike as aforesaid, said Judge did give plaintiff leave to amend his said complaint within ten (10) days from the said 9th day of March, 1920; and

WHEREAS, plaintiff herein has failed and neglected to amend his complaint as prescribed by leave of the Court so granted as aforesaid;

NOW, THEREFORE, the above-named defendants and each of them move this Honorable Court that judgment be rendered on the pleadings in favor of said defendants, dismissing plaintiff's complaint, and for judgment in favor of said defendants for their costs of suit incurred herein. Said motion is made upon the pleadings and the records on file in the above-entitled cause.

ARMSTRONG, LEWIS & KRAMER,
BULLARD & JACOBS,

Attorneys for Defendants.

[Endorsements]: Notice and Motion for Judgment.
Received copy of the within this 9th day of April, 1920. Alexander, Christy & Baxter, Attorney for Plaintiff. Filed April 9, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [39]

At a regular term, to wit, the April, 1920, term of the United States District Court for the District of Arizona, held in the courtroom of said court in the Federal Building, in the city of Phoenix, State and District of Arizona, on Tuesday, the 20th day of April, A. D. 1920. Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry and Judgment of April 20, 1920.)

No. L.-218,—PHOENIX.

SAMUEL C. PANDOLFO,

Plaintiff,

vs.

BANK OF BENSON, a Corporation, Bank of Bisbee, a Corporation, Citizens Bank & Trust Co., a Corporation, Miners & Merchants Bank, a Corporation, Buckeye Valley Bank, a Corporation, Casa Grande Valley Bank, a Corporation, Bank of Chandler, a Corporation, Bank of Duncan, a Corporation, Bank of Douglas, a Corporation, Arizona Central Bank, a Corporation, The Citizens Bank, a Corporation, Glendale State Bank, a Corporation, Security State Bank, a Corporation, Pinal Bank & Trust Co., a Corporation, Old Dominion Com. Co., a Corporation, Merchants & Stock Growers Bank, a Corporation, Holbrook State Bank, a Corporation, Bank of Jerome, a Corporation, Bank of Lowell, a Corporation, Mesa City Bank, a Corporation, Salt River Valley Bank, a Corporation, State Bank of Metcalf, a Corporation, Bank of Miami, a Corporation, Gila Valley Bank & Trust Co. a Corporation, State Bank of Morenci, a Corporation, Santa Cruz Valley Bank & Trust Co., a Corporation, Sonora Bank & Trust Co., a Corporation, Bank of Oatman, a Corporation, The

Commercial Bank, a Corporation, Payson
Com. & Trust Co., a Corporation, [40]
Central Bank of Phoenix, a Corporation,
Citizens State Bank, a Corporation, Phoenix
Savings Bank & Trust Co., a Corporation,
Valley Bank, a Corporation, Bank of Ari-
zona, a Corporation, Commercial Trust &
Savings Bank, a Corporation, Yavapai
County Savings Bank, a Corporation, Bank
of Safford, a Corporation, St. Johns State
Bank, a Corporation, San Simon Valley
Bank, a Corporation, Bank of Northern Ari-
zona, a Corporation, Bank of Superior, a
Corporation, Farmers & Merchants Bank, a
Corporation, Citizens Bank, a Corporation,
Merchants Bank & Trust Co., a Corporation,
Southern Arizona Bank & Trust Co., a Cor-
poration, Willecox Bank & Trust Co., a Cor-
poration, Williams State Bank, a Corpora-
tion, Bank of Winslow, a Corporation, Ari-
zona State Bank, a Corporation, First Na-
tional Bank, of Clifton, a Corporation, First
National Bank of Globe, a Corporation, First
National Bank of Douglas, a Corporation,
First National Bank of Nogales, a Corpora-
tion, National Bank of Arizona, a Corpora-
tion, Phoenix National Bank, a Corporation,
Prescott National Bank, a Corporation,
Tempe National Bank, a Corporation, First
National Bank of Tombstone, a Corporation,
Arizona National Bank, a Corporation, Con-
solidated National Bank, a Corporation,

First National Bank of Yuma, a Corporation,
Yuma National Bank, a Corporation,
and Morris Goldwater,

Defendants.

Minutes of Court—April 20, 1920—Judgment.

It appearing to the Court that defendants' motion to strike and demurrer herein were, on the 9th day of March, 1920, regularly heard in the above-entitled court, and that on the hearing thereof Honorable David P. Dyer, United States District Judge for the District of Arizona (Specially Assigned), then presiding over the above-entitled court, granted defendants' said motion to strike certain portions of plaintiff's complaint, and sustained defendants' demurrer to said complaint, and that at the time of granting said motion to strike and sustaining said demurrer as aforesaid, said plaintiff was given until the 17th day of March, 1920, to amend his complaint, and, [41]

WHEREAS, it further appears to this Court that the plaintiff herein has failed and neglected to amend his complaint as aforesaid,

NOW, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment be and the same is hereby rendered in favor of the defendants herein and against the plaintiff herein, and that the plaintiff's complaint herein be and the same is hereby dismissed; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said defendants' do have and recover of and from the plaintiff herein their costs herein, taxed at the sum of \$——. [42]

In the District Court of the United States in and
for the District of Arizona.

LAW—No. 218—PHOENIX.

SAMUEL C. PANDOLFO,

Plaintiff,

vs.

BANK OF BENSON, a Corporation, Bank of
Bisbee, a Corporation, Citizens Bank & Trust
Co., a Corporation, Miners & Merchants
Bank, a Corporation, Buckeye Valley Bank,
a Corporation, Casa Grande Valley Bank, a
Corporation, Bank of Chandler, a Corpora-
tion, Bank of Duncan, a Corporation, Bank
of Douglas, a Corporation, Arizona Central
Bank, a Corporation, The Citizens Bank, a
Corporation, Glendale State Bank, a Corpo-
ration, Security State Bank, a Corporation,
Pinal Bank & Trust Co., a Corporation, Old
Dominion Com. Co., a Corporation, Mer-
chants & Stock Growers Bank, a Corpora-
tion, Holbrook State Bank, a Corporation,
Bank of Jerome, a Corporation, Bank of
Lowell, a Corporation, Mesa City Bank, a
Corporation, Salt River Valley Bank, a Cor-
poration, State Bank of Metcalf, a Corpora-
tion, Bank of Miami, a Corporation, Gila
Valley Bank & Trust Co., a Corporation,
State Bank of Morenci, a Corporation, Santa
Cruz Valley Bank & Trust Co., a Corpora-
tion, Sonora Bank & Trust Co., a Corpora-

tion, Bank of Oatman, a Corporation, The Commercial Bank, a Corporation, Payson Com. & Trust Co., a Corporation, Central Bank of Phoenix, a Corporation, Citizens State Bank, a Corporation, Phoenix Savings Bank & Trust Co., a Corporation, Valley Bank, a Corporation, Bank of Arizona, a Corporation, Commercial Trust & Savings Bank, a Corporation, Yavapai County Savings Bank, a Corporation, Bank of Safford, a Corporation, St. Johns State Bank, a Corporation, San Simon Valley Bank, a Corporation, Bank of Northern Arizona, a Corporation, Bank of Superior, a Corporation, Farmers [43] & Merchants Bank, a Corporation, Citizens Bank, a Corporation, Merchants Bank & Trust Co., a Corporation, Southern Arizona Bank & Trust Co., a Corporation, Willcox Bank & Trust Co., a Corporation, Williams State Bank, a Corporation, Bank of Winslow, a Corporation, Arizona State Bank, a Corporation, First National Bank of Clifton, a Corporation, First National Bank of Globe, a Corporation, First National Bank of Douglas, a Corporation, First National Bank of Nogales, a Corporation, National Bank of Arizona, a Corporation, Phoenix National Bank, a Corporation, Prescott National Bank, a Corporation, Tempe National Bank, a Corporation, First National Bank of Tombstone, a Corporation, Arizona National Bank, a Corpo-

ration, Consolidated National Bank, a Corporation, First National Bank of Yuma, a Corporation, Yuma National Bank, a Corporation, and Morris Goldwater,

Defendants.

Petition for Writ of Error and Order Allowing Same.

To the Honorable WILLIAM H. SAWTELLE,
Judge of said Court:

And now comes Samuel C. Pandolfo, plaintiff, by Jones, Hocker, Sullivan & Angert and Alexander, Christy & Baxter, his attorneys, and feeling himself aggrieved by the final judgment of this court entered against him and in favor of the defendants herein on the 20th day of April, 1920, hereby prays that writ of error may be allowed to him from the United States Circuit Court of Appeals for the Ninth Circuit, to the District Court for the District of Arizona, and in connection with this petition petitioner herewith presents his assignments of error.

Petitioner further prays that the amount of security be fixed by the order allowing the writ of error.

JONES, HOCKER, SULLIVAN &
ANGERT,

ALEXANDER & CHRISTY,

Attorneys for Plaintiff in Error. [44]

Phoenix, Arizona, Sept. 20, 1920.

And now, to wit, on Sept. 20, 1920, it is
ORDERED that the writ of error be allowed as

prayed for and bond on writ of error is hereby fixed at \$500.00.

WM. H. SAWTELLE,
District Judge.

[Endorsement]: Petition for Writ of Error.
Filed Sept. 20, 1920. C. R. McFall, Clerk United
States District Court for the District of Arizona.
[45]

In the District Court of the United States, in and
for the District of Arizona.

LAW—No. 218—PHOENIX.

SAMUEL C. PANDOLFO,

Plaintiff,

vs.

BANK OF BENSON, a Corporation, Bank of
Bisbee, a Corporation, Citizens Bank & Trust
Co., a Corporation, Miners & Merchants
Bank, a Corporation, Buckeye Valley Bank,
a Corporation, Casa Grande Valley Bank, a
Corporation, Bank of Chandler, a Corpora-
tion, Bank of Duncan, a Corporation, Bank
of Douglas, a Corporation, Arizona Central
Bank, a Corporation, The Citizens Bank, a
Corporation, Glendale State Bank, a Corpo-
ration, Security State Bank, a Corporation,
Pinal Bank & Trust Co., a Corporation,
Old Dominion Com. Co., a Corporation,
Merchants & Stock Growers Bank, a Corpo-
ration, Holbrook State Bank, a Corporation,

Bank of Jerome, a Corporation, Bank of Lowell, a Corporation, Mesa City Bank, a Corporation, Salt River Valley Bank, a Corporation, State Bank of Metcalf, a Corporation, Bank of Miami, a Corporation, Gila Valley Bank & Trust Co., a Corporation, State Bank of Morenci, a Corporation, Santa Cruz Valley Bank & Trust Co., a Corporation, Sonora Bank & Trust Co., a Corporation, Bank of Oatman, a Corporation, The Commercial Bank, a Corporation, Payson Com. & Trust Co., a Corporation, Central Bank of Phoenix, a Corporation, Citizens State Bank, a Corporation, Phoenix Savings Bank & Trust Co., a Corporation, Valley Bank, a Corporation, Bank of Arizona, a Corporation, Commercial Trust & Savings Bank, a Corporation, Yavapai County Savings Bank, a Corporation, Bank of Safford, a Corporation, St. Johns State Bank, a Corporation, San Simon Valley Bank, a Corporation, Bank of Northern Arizona, a Corporation, Bank of Superior, a Corporation, Farmers [46] & Merchants Bank, a Corporation, Citizens Bank, a Corporation, Merchants Bank & Trust Co., a Corporation, Southern Arizona Bank & Trust Co., a Corporation, Willcox Bank & Trust Co., a Corporation, Williams State Bank, a Corporation, Bank of Winslow, a Corporation, Arizona State Bank, a Corporation, First National Bank of Clifton, a Corporation,

First National Bank of Globe, a Corporation, First National Bank of Douglas, a Corporation, First National Bank of Nogales, a Corporation, National Bank of Arizona, a Corporation, Phoenix National Bank, a Corporation, Prescott National Bank, a Corporation, Tempe National Bank, a Corporation, First National Bank of Tombstone, a Corporation, Arizona National Bank, a Corporation, Consolidated National Bank, a Corporation, First National Bank of Yuma, a Corporation, Yuma National Bank, a Corporation, and Morris Goldwater,

Defendants.

Assignments of Error.

And now comes the plaintiff in error, by Jones, Hocker, Sullivan & Angert, and Alexander, Christy & Baxter, his attorneys, and in connection with his petition for a writ of error says that in the record proceedings and in the final judgment aforesaid, manifest error has intervened to the prejudice of the plaintiff in error, to wit:

1. The Court erred in sustaining the motions to strike of the defendants below the following words from plaintiff's petition as surplusage, to wit:

a. From line 24, page 5, "criminal conduct."

b. From lines 30, 31, and 32, page 5, and line 1, page 6, "criminal conduct and practices of embezzlement and theft and obtaining money under false pretences in and about the transaction and discharge of financial matters."

c. From lines 2, 3 and 4, page 6, "that the plaintiff had been guilty of the violation of the criminal laws of [47] the States of Texas, New Mexico and Arizona."

d. From lines 4, 5 and 6, page 6, "and had been guilty of the crimes of embezzlement, theft, larceny, obtaining money under false pretences."

e. From lines 7, 8 and 9, page 6, "by directly or indirectly unlawfully taking, receiving or obtaining money legally belonging to other persons."

2. The Court erred in sustaining the demurrer of the defendants below to the petition of the plaintiff below and plaintiff in error herein.

By reason whereof the plaintiff in error prays that the judgment aforesaid may be reversed, etc.

JONES, HOCKER, SULLIVAN &

ANGERT,

ALEXANDER & CHRISTY,

Attorneys for Plaintiff in Error.

[Endorsements]: Assignments of Error. Filed Sept. 20, 1920. C. R. McFall, Clerk, United States District Court for the District of Arizona. [48]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Samuel C. Pandolfo, as principal, and the National Surety Company, a corporation duly authorized and qualified under the laws of the United States to become surety herein, as surety, are held and firmly bound unto the Bank of Benson, a corporation, Bank of Bisbee, a corporation, Citi-

zens Bank & Trust Co., a corporation, Miners & Merchants Bank, a corporation, Buckeye Valley Bank, a corporation, Casa Grande Valley Bank, a corporation, Bank of Chandler, a corporation, Bank of Duncan, a corporation, Bank of Douglas, a corporation, Arizona Central Bank, a corporation, The Citizens Bank, a corporation, Glendale State Bank, a corporation, Security State Bank, a corporation, Pinal Bank & Trust Co., a corporation, Old Dominion Com. Co., a corporation, Merchants & Stock Growers Bank, a corporation, Holbrook State Bank, a corporation, Bank of Jerome, a corporation, Bank of Lowell, a corporation, Mesa City Bank, a corporation, Salt River Valley Bank, a corporation, State Bank of Metcalf, a corporation, Bank of Miami, a corporation, Gila Valley Bank & Trust Co., a corporation, State Bank of Morenci, a corporation, Santa Cruz Valley Bank & Trust Co., a corporation, Sonora Bank & Trust Co., a corporation, Bank of Oatman, a corporation, The Commercial Bank, a corporation, Payson Com. & Trust Co., a corporation, Central Bank of Phoenix, a corporation, Citizens State Bank, a corporation, Phoenix Savings Bank & Trust Co., a corporation, Valley Bank, a corporation, Bank of Arizona, a corporation, Commercial Trust & Savings Bank, a corporation, Yavapai County Savings Bank, a corporation, Bank of Safford, a corporation, St. Johns State Bank, a corporation, San Simon Valley Bank, a corporation, Bank of Northern Arizona, a corporation, Bank of Superior, a corporation, Farmers & Merchants Bank, a corporation, Citizens Bank,

a corporation, [49] Merchants Bank & Trust Co., a corporation, Southern Arizona Bank & Trust Co., a corporation, Willcox Bank & Trust Co., a corporation, Williams State Bank, a corporation, Bank of Winslow, a corporation, Arizona State Bank, a corporation, First National Bank of Clifton, a corporation, First National Bank of Globe, a corporation, First National Bank of Douglas, a corporation, First National Bank of Nogales, a corporation, National Bank of Arizona, a corporation, Phoenix National Bank, a corporation, Prescott National Bank, a corporation, Tempe National Bank, a corporation, First National Bank of Tombstone, a corporation, Arizona National Bank, a corporation, Consolidated National Bank, a corporation, First National Bank of Yuma, a corporation, Yuma National Bank, a corporation, and Morris Goldwater, in the full and just sum of Five Hundred Dollars (\$500.00), to be paid to said Bank of Benson, a corporation, Bank of Bisbee, a corporation, Citizens Bank & Trust Co., a corporation, Miners & Merchants Bank, a corporation, Buckeye Valley Bank, a corporation, Casa Grande Valley Bank, a corporation, Bank of Chandler, a corporation, Bank of Duncan, a corporation, Bank of Douglas, a corporation, Arizona Central Bank, a corporation, The Citizens Bank, a corporation, Glendale State Bank, a corporation, Security State Bank, a corporation, Pinal Bank & Trust Co., a corporation, Old Dominion Com. Co., a corporation, Merchants & Stock Growers Bank, a corporation, Holbrook State Bank, a corporation, Bank of

Jerome, a corporation, Bank of Lowell, a corporation, Mesa City Bank, a corporation, Salt River Valley Bank, a corporation, State Bank of Metcalf, a corporation, Bank of Miami, a corporation, Gila Valley Bank & Trust Co., a corporation, State Bank of Morenci, a corporation, Santa Cruz Valley Bank & Trust Co., a corporation, Sonora Bank & Trust Co., a corporation, Bank of Oatman, a corporation, The Commercial Bank, a corporation, Payson Com. & Trust Co., a corporation, Central Bank of Phoenix, a corporation, Citizens [50] State Bank, a corporation, Phoenix Savings Bank & Trust Co., a corporation, Valley Bank, a corporation, Bank of Arizona, a corporation, Commercial Trust & Savings Bank, a corporation, Yavapai County Savings Bank, a corporation, Bank of Safford, a corporation, St. Johns State Bank, a corporation, San Simon Valley Bank, a corporation, Bank of Northern Arizona, a corporation, Bank of Superior, a corporation, Farmers & Merchants Bank, a corporation, Citizens Bank, a corporation, Merchants Bank & Trust Co., a corporation, Southern Arizona Bank & Trust Co., a corporation, Willcox Bank & Trust Co. a corporation, Williams State Bank, a corporation, Bank of Winslow, a corporation, Arizona State Bank, a corporation, First National Bank, of Clifton, a corporation, First National Bank of Globe, a corporation, First National Bank of Douglas, a corporation, First National Bank of Nogales, a corporation, National Bank of Arizona, a corporation, Phoenix National Bank, a corporation, Prescott National Bank, a

corporation, Tempe National Bank, a corporation, First National Bank of Tombstone, a corporation, Arizona National Bank, a corporation, Consolidated National Bank, a corporation, First National Bank of Yuma, a corporation, Yuma National Bank, a corporation, and Morris Goldwater, certain attorney, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents. Sealed with our seals and dated this 20th day of September, 1920.

WHEREAS, lately at a term of the District Court of the United States for the District of Arizona, in a suit pending in said court between Samuel C. Pandolfo and Bank of Benson, a corporation, Bank of Bisbee, a corporation, Citizens Bank & Trust Co., a corporation, Miners & Merchants Bank, a corporation, Buckeye Valley Bank, a corporation, Casa Grande [51] Valley Bank, a corporation, Bank of Chandler, a corporation, Bank of Duncan, a corporation, Bank of Douglas, a corporation, Arizona Central Bank, a corporation, The Citizens Bank, a corporation, Glendale State Bank, a corporation, Security State Bank, a corporation, Pinal Bank & Trust Co., a corporation, Old Dominion Com. Co., a corporation, Merchants & Stock Growers Bank, a corporation, Holbrook State Bank, a corporation, Bank of Jerome, a corporation, Bank of Lowell, a corporation, Mesa City Bank, a corporation, Salt River Valley Bank, a corporation, State Bank of Metcalf,

a corporation, Bank of Miami, a corporation, Gila Valley Bank & Trust Co., a corporation, State Bank of Morenci, a corporation, Santa Cruz Valley Bank & Trust Co., a corporation, Sonora Bank & Trust Co., a corporation, Bank of Oatman, a corporation, The Commercial Bank, a corporation, Payson Com. & Trust Co., a corporation, Central Bank of Phoenix, a corporation, Citizens State Bank, a corporation, Phoenix Savings Bank & Trust Co., a corporation, Valley Bank, a corporation, Bank of Arizona, a corporation, Commercial Trust & Savings Bank, a corporation, Yavapai County Savings Bank, a corporation, Bank of Safford, a corporation, St. Johns State Bank, a corporation, San Simon Valley Bank, a corporation, Bank of Northern Arizona, a corporation, Bank of Superior, a corporation, Farmers & Merchants Bank, a corporation, Citizens Bank, a corporation, Merchants Bank & Trust Co., a corporation, Southern Arizona Bank & Trust Co., a corporation, Willcox Bank & Trust Co., a corporation, Williams State Bank, a corporation, Bank of Winslow, a corporation, Arizona State Bank, a corporation, First National Bank, of Clifton, a corporation, First National Bank of Globe, a corporation, First National Bank of Douglas, a corporation, First National Bank of Nogales, a corporation, National Bank of Arizona, a corporation, Phoenix National Bank, a corporation, Prescott National Bank, a corporation, Tempe National Bank, a [52] corporation, First National Bank of Tombstone, a corporation, Arizona National Bank, a corporation, Consolidated Na-

tional Bank, a corporation, First National Bank of Yuma, a corporation, Yuma National Bank, a corporation, and Morris Goldwater, a judgment was rendered against the said Samuel C. Pandolfo dismissing his petition with costs and the said Samuel C. Pandolfo having obtained a writ of error from the Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the aforesaid suit.

NOW, the condition of the above obligation is such that if the said Samuel C. Pandolfo shall prosecute his writ of error to effect and will answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

SAMUEL C. PANDOLFO. (Seal)

NATIONAL SURETY CO. (Seal)

By B. C. STURGES,

By MARJORIE KINGSBERRY,

Attorneys in Fact.

Sealed and delivered in the presence of

Approved by

[Seal] WM. H. SAWTELLE,

Judge.

[Endorsements]: Bond on Writ of Error. Filed Sept. 20, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona. [53]

**Writ of Error from Circuit Court of Appeals to
United States District Court for the District of
Arizona (Copy).**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America,
to the Judges of the District Court of the
United States for the District of Arizona,
GREETING:

Because in the record and proceedings, as also
in the rendition of the judgment of a plea which
is in the said District Court, before you, or some
of you, between Samuel C. Pandolfo, plaintiff, and
the Bank of Benson, a corporation, Bank of Bisbee,
a corporation, Citizens Bank & Trust Co., a corpo-
ration, Miners & Merchants Bank, a corporation,
Buckeye Valley Bank, a corporation, Casa Grande
Valley Bank, a corporation, Bank of Chandler, a
corporation, Bank of Duncan, a corporation, Bank
of Douglas, a corporation, Arizona Central Bank,
a corporation, The Citizens Bank, a corporation,
Glendale State Bank, a corporation, Security State
Bank, a corporation, Pinal Bank & Trust Co., a
corporation, Old Dominion Com. Co., a corporation,
Merchants & Stock Growers Bank, a corporation,
Holbrook State Bank, a corporation, Bank of
Jerome, a corporation, Bank of Lowell, a corpora-
tion, Mesa City Bank, a corporation, Salt River
Valley Bank, a corporation, State Bank of Metcalf,
a corporation, Bank of Miami, a corporation, Gila
Valley Bank & Trust Co., a corporation, State
Bank of Morenci, a corporation, Santa Cruz Valley

Bank & Trust Co., a corporation, Sonora Bank & Trust Co., a corporation, Bank of Oatman, a corporation, The Commercial Bank, a corporation, Payson Com. & Trust Co., a corporation, Central Bank of Phoenix, a corporation, Citizens State Bank, a corporation, Phoenix Savings Bank & Trust Co., a corporation, Valley Bank, a corporation, Bank of Arizona, a corporation, Commercial Trust [54] & Savings Bank, a corporation, Yavapai County Savings Bank, a corporation, Bank of Safford, a corporation, St. Johns State Bank, a corporation, San Simon Valley Bank, a corporation, Bank of Northern Arizona, a corporation, Bank of Superior, a corporation, Farmers & Merchants Bank, a corporation, Citizens Bank, a corporation, Merchants Bank & Trust Co., a corporation, Southern Arizona Bank & Trust Co., a corporation, Willcox Bank & Trust Co., a corporation, Williams State Bank, a corporation, Bank of Winslow, a corporation, Arizona State Bank, a corporation, First National Bank, of Clifton, a corporation, First National Bank of Globe, a corporation, First National Bank, of Douglas, a corporation, First National Bank of Nogales, a corporation, National Bank of Arizona, a corporation, Phoenix National Bank, a corporation, Prescott National Bank, a corporation, Tempe National Bank, a corporation, First National Bank of Tombstone, a corporation, Arizona National Bank, a corporation, Consolidated National Bank, a corporation, First National Bank of Yuma, a corporation, Yuma National Bank, a corporation, and

Morris Goldwater, defendants, a manifest error hath happened to the great damage of the said Samuel C. Pandolfo, as is said and appears by the complaint:

We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtroom of said court in the city of San Francisco, State of California, together with this writ, so that you have the same at said place before the Justices aforesaid, on the twentieth day of October next, that the record and proceedings [55] aforesaid being inspected, the said Justices of said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 20th day of September, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States the one hundred and forty-fourth.

C. R. McFALL,
Clerk of United States District Court for the
District of Arizona.

The foregoing writ is hereby allowed.

District Judge. [56]

Return of Writ of Error (Copy).

United States District Court,
For the District of Arizona,—ss.

In obedience to the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Ninth Circuit, a true and complete transcript of the record and proceedings in the foregoing entitled cause this 18th day of October, 1920.

[Seal] C. R. McFALL,
Clerk of the District Court of the United States,
for the District of Arizona.

[Endorsements]: Writ of Error from Circuit Court of Appeals to United States District Court for the District of Arizona. Filed Sept. 20, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [57]

In the District Court of the United States Within
and for the District of Arizona, at Phoenix.

LAW—No. 218—PHOENIX.

SAMUEL C. PANDOLFO,

Plaintiff,

vs.

BANK OF BENSON, a Corporation, Bank of
Bisbee, a Corporation, Citizens Bank & Trust
Co., a Corporation, Miners & Merchants

Bank, a Corporation, Buckeye Valley Bank, a Corporation, Casa Grande Valley Bank, a Corporation, Bank of Chandler, a corporation, Bank of Duncan, a corporation, Bank of Douglas, a Corporation, Arizona Central Bank, a Corporation, The Citizens Bank, a Corporation, Glendale State Bank, a Corporation, Security State Bank, a Corporation, Pinal Bank & Trust Co., a Corporation, Old Dominion Com. Co., a Corporation, Merchants & Stock Growers Bank, a Corporation, Holbrook State Bank, a Corporation, Bank of Jerome, a Corporation, Bank of Lowell, a Corporation, Mesa City Bank, a Corporation, Salt River Valley Bank, a Corporation, State Bank of Metcalf, a Corporation, Bank of Miami, a Corporation, Gila Valley Bank & Trust Co., a Corporation, State Bank of Morenci, a Corporation, Santa Cruz Valley Bank & Trust Co., a Corporation, Sonora Bank & Trust Co., a Corporation, Bank of Oatman, a Corporation, The Commercial Bank, a Corporation, Payson Com. & Trust Co., a Corporation, Central Bank of Phoenix, a Corporation, Citizens State Bank, a Corporation, Phoenix Savings Bank & Trust Co., a Corporation, Valley Bank, a Corporation, Bank of Arizona, a Corporation, Commercial Trust & Savings Bank, a Corporation, Yavapai County Savings Bank, a Corporation, Bank of Safford, a Corporation, St. Johns State Bank, a Cor-

poration, San Simon Valley Bank, a Corporation, Bank of Northern Arizona, a Corporation, Bank of Superior, a Corporation, Farmers [58] & Merchants Bank, a Corporation, Citizens Bank, a Corporation, Merchants Bank & Trust Co., a Corporation, Southern Arizona Bank & Trust Co., a Corporation, Willcox Bank & Trust Co., a Corporation, Williams State Bank, a Corporation, Bank of Winslow, a Corporation, Arizona State Bank, a Corporation, First National Bank of Clifton, a Corporation, First National Bank of Globe, a Corporation, First National Bank of Douglas, a Corporation, First National Bank of Nogales, a Corporation, National Bank of Arizona, a Corporation, Phoenix National Bank, a Corporation, Prescott National Bank, a Corporation, Tempe National Bank, a Corporation, First National Bank of Tombstone, a Corporation, Arizona National Bank, a Corporation, Consolidated National Bank, a Corporation, First National Bank of Yuma, a Corporation, Yuma National Bank, a Corporation, and Morris Goldwater,

Defendants.

Citation (Copy).

City of San Francisco,

State of California,

United States of America,—ss.

The President of the United States to Bank of Benson, a Corporation, Bank of Bisbee, a

Corporation, Citizens Bank & Trust Co., a Corporation Miners & Merchants Bank, a Corporation, Buckeye Valley Bank, a Corporation, Casa Grande Valley Bank, a Corporation, Bank of Chandler, a Corporation, Bank of Duncan, a Corporation, Bank of Douglas, a Corporation, Arizona Central Bank, a Corporation, The Citizens Bank, a Corporation, Glendale State Bank, a Corporation, Security State Bank, a Corporation, Pinal Bank & Trust Co., a Corporation, Old Dominion Com. Co., a Corporation, Merchants & Stock Growers Bank, a Corporation, Holbrook State Bank, a Corporation, Bank of Jerome, a Corporation, Bank of Lowell, a (2) [59] Corporation, Mesa City Bank, a Corporation, Salt River Valley Bank, a Corporation, State Bank of Metcalf, a Corporation, Bank of Miami, a Corporation, Gila Valley Bank & Trust Co., a Corporation, State Bank of Morenci, a Corporation, Santa Cruz Valley Bank & Trust Co., a Corporation, Sonora Bank & Trust Co., a Corporation, Bank of Oatman, a Corporation, The Commercial Bank, a Corporation, Payson Com. & Trust Co., a Corporation, Central Bank of Phoenix, a Corporation, Citizens State Bank, a Corporation, Phoenix Savings Bank & Trust Co., a Corporation, Valley Bank, a Corporation, Bank of Arizona, a Corporation, Commercial Trust & Savings Bank, a Corporation, Yavapai County Savings Bank, a Corporation, Bank of Safford, a Corporation, St. Johns State Bank,

a Corporation, San Simon Valley Bank, a Corporation, Bank of Northern Arizona, a Corporation, Bank of Superior, a Corporation, Farmers & Merchants Bank, a Corporation, Citizens Bank, a Corporation, Merchants Bank & Trust Co., a Corporation, Southern Arizona Bank & Trust Co., a Corporation, Willcox Bank & Trust Co., a Corporation, Williams State Bank, a Corporation, Bank of Winslow, a Corporation, Arizona State Bank, a Corporation, First National Bank of Clifton, a Corporation, First National Bank of Globe, a Corporation, First National Bank of Douglas, a Corporation, First National Bank of Nogales, a Corporation, National Bank of Arizona, a Corporation, Phoenix National Bank, a Corporation, Prescott National Bank, a Corporation, Tempe National Bank, a Corporation, First National Bank of Tombstone, a Corporation, Arizona National Bank, a Corporation, Consolidated National Bank, a Corporation, First National Bank of Yuma, a Corporation, Yuma National Bank, a Corporation, and Morris Goldwater, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the (3) [60] Ninth Circuit, at the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to a writ of error duly allowed by the District Court of the United States, in and for the District of Arizona, and filed in the clerk's office of said court on the

20th day of September, 1920, in a cause wherein Samuel C. Pandolfo is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the party in that behalf.

WITNESS, the Honorable WM. H. SAWTELLE, Judge of the District Court of the United States in and for the District of Arizona, this 20th day of Sept., 1920.

WM. H. SAWTELLE,
District Judge.

[Seal]

Attest: C. R. McFALL,
Clerk.

By Clyde C. Downing,
Deputy Clerk.

Service of the within citation and receipt of a copy is hereby admitted this 20th day of Sept., 1920.

ARMSTRONG, LEWIS & KRAMER,
BULLARD & JACOBS,
Attorneys for Defendants in Error. (4)

[Endorsements]: Citation. Filed September 20, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona. [61]

In the District Court of the United States for the
District of Arizona.

LAW 218—PHOENIX.

SAMUEL C. PANDOLFO,

Plaintiff,

vs.

BANK OF BENSON, a Corporation, BANK OF
BISBEE, a Corporation, CITIZENS BANK
& TRUST CO., a Corporation, et al.,
Defendants.

Praeipie for Transcript of Record.

The clerk of this court is hereby directed to prepare and certify a transcript of the record in the above-entitled case for the use of the United States Circuit Court of Appeals for the Ninth Circuit, by including therein the following:

1. Plaintiff's amended petition.
2. Defendants' motions, demurrers and answer to petition.
3. Motions, demurrers and answer of defendant Morris Goldwater to amended petition.
4. Order sustaining motions to strike.
5. Order sustaining demurrers.
6. Judgment.
7. Petition for writ of error with order granting same.
8. Assignments of error.
9. Bond on writ of error.
10. Citation.

and such other papers, records, and orders filed and made in connection with the above-entitled case.

Dated this 20th day of September, 1920.

JONES, HOCKER, SULLIVAN & AN-
GERT,

ALEXANDER & CHRISTY,

Attorneys for Plaintiff in Error.

Service of the within praecipe of record and receipt of a copy is hereby admitted this 21st day of Sept., 1920.

ARMSTRONG, LEWIS & KRAMER,
BULLARD & JACOBS,

Attorneys for Defendants in Error.

[Endorsements]: Praecipe for Record. Filed Sept. 20, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona. [62]

In the District Court of the United States for the
District of Arizona.

SAMUEL C. PANDOLFO,

Plaintiff,

vs.

BANK OF BENSON, a Corporation, et al.,
Defendants.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of

the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said court, including the records, papers and files in the case of Samuel C. Pandolfo, Plaintiff, versus Bank of Benson, a Corporation et al., Defendants, said case being number 218—Law (Phoenix) on the docket of said court.

I further certify that the foregoing 63 pages, numbered from 1 to 63, inclusive, constitute a full, true and correct copy of the record, and of the assignment of errors and all proceedings in the above-entitled cause, as set forth in the praecipe filed in said cause and made a part of this transcript as the same appears from the originals of record and on file in my office as such clerk.

And I further certify that there is also annexed to said transcript the original writ of error and the original citation issued in said cause.

I further certify that the cost of preparing and certifying to said record, amounting to Nineteen and 70/100 Dollars (\$19.70), has been paid to me by the above-named plaintiff.

WITNESS my hand and the seal of said court this 18th day of October, 1920.

[Seal]

C. R. McFALL,

Clerk of the District Court of the United States for
the District of Arizona. [63]

**Writ of Error from Circuit Court of Appeals to
United States District Court for the District of
Arizona (Original).**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to
the Judges of the District Court of the United
States for the District of Arizona, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is in
the said District Court, before you, or some of you,
between Samuel C. Pandolfo, plaintiff, and the Bank
of Benson, a Corporation, Bank of Bisbee, a Cor-
poration, Citizens Bank & Trust Co., a Corporation,
Miners & Merchants Bank, a Corporation, Buckeye
Valley Bank, a Corporation, Casa Grande Valley
Bank, a Corporation, Bank of Chandler, a Corpora-
tion, Bank of Duncan, a Corporation, Bank of Doug-
las, a Corporation, Arizona Central Bank, a Corpora-
tion, The Citizens Bank, a Corporation, Glendale
State Bank, a Corporation, Security State Bank, a
Corporation, Pinal Bank & Trust Co., a Corporation,
Old Dominion Com. Co., a Corporation, Merchants &
Stock Growers Bank, a Corporation, Holbrook
State Bank, a Corporation, Bank of Jerome, a Cor-
poration, Bank of Lowell, a Corporation, Mesa City
Bank, a Corporation, Salt River Valley Bank, a Cor-
poration, State Bank of Metcalf, a Corporation,
Bank of Miami, a Corporation, Gila Valley Bank &
Trust Co., a Corporation, State Bank of Morenci,
a Corporation, Santa Cruz Valley Bank & Trust Co.,
a Corporation, Sonora Bank & Trust Co., a Corpora-

tion, Bank of Oatman, a Corporation, The Commercial Bank, a Corporation, Payson Com. & Trust Co., a Corporation, Central Bank of Phoenix, a Corporation, Citizens State Bank, a Corporation, Phoenix Savings Bank & Trust Co., a Corporation, Valley Bank, a Corporation, Bank of Arizona, a Corporation, Commercial Trust [64] & Savins Bank, a Corporation, Yavapai County Savings Bank, a Corporation, Bank of Safford, a Corporation, St. Johns State Bank, a Corporation, San Simon Valley Bank, a Corporation, Bank of Northern Arizona, a Corporation, Bank of Superior, a Corporation, Farmers & Merchants Bank, a Corporation, Citizens Bank, a Corporation, Merchants Bank & Trust Co., a Corporation, Southern Arizona Bank & Trust Co., a Corporation, Willcox Bank & Trust Co., a Corporation, Williams State Bank, a Corporation, Bank of Winslow, a Corporation, Arizona State Bank, a Corporation, First National Bank of Clifton, a Corporation, First National Bank of Globe, a Corporation, First National Bank of Douglas, a Corporation, First National Bank of Nogales, a Corporation, National Bank of Arizona, a Corporation, Phoenix National Bank, a Corporation, Prescott National Bank, a Corporation, Tempe National Bank, a Corporation, First National Bank of Tombstone, a Corporation, Arizona National Bank, a Corporation, Consolidated National Bank, a Corporation, First National Bank of Yuma, a Corporation, Yuma National Bank, a Corporation, and Morris Goldwater, defendants, a manifest error hath happened to the great damage of the said Samuel C.

Pandolfo, as is said and appears by the complaint:

We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtroom of the said court in the city of San Francisco, State of California, together with this writ, so that you have the same at said place before the Justices aforesaid, on the twentieth day of October next, that the record and proceedings [65] aforesaid being inspected, the said Justices of said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 20th day of September, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States the one hundred and forty-fourth.

[Seal]

C. R. McFALL,

Clerk of United States District Court for the District of Arizona.

The foregoing writ is hereby allowed.

District Judge. [66]

Return of Writ of Error (Original).

United States District Court,

For the District of Arizona,—ss.

In obedience to the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Ninth Circuit a true and complete transcript of the record and proceedings in the foregoing entitled cause this 18th day of October, 1920.

[Seal]

C. R. McFALL,

Clerk of the District Court of the United States, for
the District of Arizona. [67]

[Endorsed]: No. 218—Phoenix. In the District Court of the United States Within and for the District of Arizona. Samuel C. Pandolfo, Plaintiff, vs. Bank of Benson, a Corporation, Bank of Bisbee, a Corporation, Citizens Bank & Trust Co., a Corporation, et al., Defendants. Writ of Error from Circuit Court of Appeals to United States District Court for the District of Arizona. Filed Sept. 20, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [68]

In the District Court of the United States Within
and for the District of Arizona at Phoenix.

LAW—No. 218—PHOENIX.

SAMUEL C. PANDOLFO,

Plaintiff,

vs.

BANK OF BENSON, a Corporation, Bank of
Bisbee, a Corporation, Citizens Bank & Trust
Co., a Corporation, Miners & Merchants
Bank, a Corporation, Buckeye Valley Bank,
a Corporation, Casa Grande Valley Bank, a
Corporation, Bank of Chandler, a Corpora-
tion, Bank of Duncan, a Corporation, Bank
of Douglas, a Corporation, Arizona Central
Bank, a Corporation, The Citizens Bank, a
Corporation, Glendale State Bank, a Corpo-
ration, Security State Bank, a Corporation,
Pinal Bank & Trust Co., a Corporation, Old
Dominion Com. Co., a Corporation, Mer-
chants & Stock Growers Bank, a Corpora-
tion, Holbrook State Bank, a Corporation,
Bank of Jerome, a Corporation, Bank of
Lowell, a Corporation, Mesa City Bank, a
Corporation, Salt River Valley Bank, a Cor-
poration, State Bank of Metcalf, a Corpora-
tion, Bank of Miami, a Corporation, Gila
Valley Bank & Trust Co., a Corporation,
State Bank of Morenci, a Corporation, Santa
Cruz Valley Bank & Trust Co., a Corporation,

Sonora Bank & Trust Co., a Corporation, Bank of Oatman, a Corporation, The Commercial Bank, a Corporation, Payson Com. & Trust Co., a Corporation, Central Bank of Phoenix, a Corporation, Citizens State Bank, a Corporation, Phoenix Savings Bank & Trust Co., a Corporation, Valley Bank, a Corporation, Bank of Arizona, a Corporation, Commercial Trust & Savings Bank, a Corporation, Yavapai County Savings Bank, a Corporation, Bank of Safford, a Corporation, St. Johns State Bank, a Corporation, San Simon Valley Bank, a Corporation, Bank of Northern Arizona, a Corporation, Bank of Superior, a Corporation, [69] Farmers & Merchants Bank, a Corporation, Citizens Bank, a Corporation, Merchants Bank & Trust Co., a Corporation, Southern Arizona Bank & Trust Co., a Corporation, Willcox Bank & Trust Co., a Corporation, Williams State Bank, a Corporation, Bank of Winslow, a Corporation, Arizona State Bank, a Corporation, First National Bank, of Clifton, a Corporation, First National Bank of Globe, a Corporation, First National Bank of Douglas, a Corporation, First National Bank of Nogales, a Corporation, National Bank of Arizona, a Corporation, Phoenix National Bank, a Corporation, Prescott National Bank, a Corporation, Tempe National Bank, a Corporation, First National Bank of Tombstone,

a Corporation, Arizona National Bank, a Corporation, Consolidated National Bank, a Corporation, First National Bank of Yuma, a Corporation, Yuma National Bank, a Corporation, and Morris Goldwater,

Defendants.

Citation (Original).

City of San Francisco,

State of California,

United States of America,—ss.

The President of the United States, to Bank of Benson, a Corporation, Bank of Bisbee, a Corporation, Citizens Bank & Trust Co., a Corporation, Miners & Merchants Bank, a Corporation, Buckeye Valley Bank, a Corporation, Casa Grande Valley Bank, a Corporation, Bank of Chandler, a Corporation, Bank of Duncan, a Corporation, Bank of Douglas, a Corporation, Arizona Central Bank, a Corporation, The Citizens Bank, a Corporation, Glendale State Bank, a Corporation, Security State Bank, a Corporation, Pinal Bank & Trust Co., a Corporation, Old Dominion Com. Co., a Corporation, Merchants & Stock Growers Bank, a Corporation, Holbrook State Bank, a Corporation, Bank of Jerome, a Corporation, Bank of Lowell, a [70] Corporation, Mesa City Bank, a Corporation, Salt River Valley Bank, a Corporation, State Bank of Metcalf, a Corporation, Bank of Miami, a Corporation, Gila Valley Bank & Trust Co., a Corporation, State Bank

of Morenci, a Corporation, Santa Cruz Valley Bank & Trust Co., a Corporation, Sonora Bank & Trust Co., a Corporation, Bank of Oatman, a Corporation, The Commercial Bank, a Corporation, Payson Com. & Trust Co., a Corporation, Central Bank of Phoenix, a Corporation, Citizens State Bank, a Corporation, Phoenix Savings Bank & Trust Co., a Corporation, Valley Bank, a Corporation, Bank of Arizona, a Corporation, Commercial Trust & Savings Bank, a Corporation, Yavapai County Savings Bank, a Corporation, Bank of Safford, a corporation, St. Johns State Bank, a Corporation, San Simon Valley Bank, a Corporation, Bank of Northern Arizona, a Corporation, Bank of Superior, a Corporation, Farmers & Merchants Bank, a Corporation, Citizens Bank, a Corporation, Merchants Bank & Trust Co., a Corporation, Southern Arizona Bank & Trust Co., a Corporation, Willcox Bank & Trust Co., a Corporation, Williams State Bank, a Corporation, Bank of Winslow, a Corporation. Arizona State Bank, a Corporation, First National Bank of Clifton, a Corporation, First National Bank of Globe, a Corporation, First National Bank of Douglas, a Corporation, First National Bank of Nogales, a Corporation, National Bank of Arizona, a Corporation, Phoenix National Bank, a Corporation, Prescott National Bank, a Corporation, Tempe National Bank, a Corporation, First National Bank of Tombstone, a Corporation, Arizona National Bank, a Corporation,

Consolidated National Bank, a Corporation,
First National Bank of Yuma, a Corporation,
Yuma National Bank, a Corporation, and
Morris Goldwater, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the [71] Ninth Circuit, at the city of San Francisco, State of California within thirty days from the date of this writ, pursuant to a writ of error duly allowed by the District Court of the United States, in and for the District of Arizona, and filed in the clerk's office of said court on the 20th day of September, 1920, in a cause wherein Samuel C. Pandolfo is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the party in that behalf.

WITNESS, The Honorable WM. H. SAWTELLE, Judge of the District Court of the United States in and for the District of Arizona, this 20th day of Sept. 1920.

WM. H. SAWTELLE,
District Judge.

[Seal]

Attest: C. R. McFALL,
Clerk.

By Clyde C. Downing,
Deputy Clerk.

Service of the within citation and receipt of a copy is hereby admitted this 20th day of Sept. 1920.

ARMSTRONG, LEWIS & KRAMER,
BULLARD & JACOBS,

Attorneys for Defendants in Error. [72]

[Endorsed]: Law—No. 218—Phoenix. In the District Court of the United States, in and for the District of Arizona. Samuel C. Pandolfo, Plaintiff, vs. Bank of Benson, a Corporation, et al., Defendants. Citation. Filed September 20, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona.

[Endorsed]: No. 3589. United States Circuit Court of Appeals for the Ninth Circuit. Samuel C. Pandolfo, Plaintiff in Error, vs. Bank of Benson, a Corporation, et al., Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Filed October 20, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OCTOBER TERM, 1920.

SAMUEL C. PANDOLFO,	}	No. 3589.
Plaintiff in Error,		
vs.		
BANK OF BENSON, a Corporation,		
et al.,		
Defendants in Error.	}	

In Error to the District Court of the United States within
and for the District of Arizona, at Phoenix.
Honorable David P. Dyer, District Judge.

BRIEF OF PLAINTIFF IN ERROR.

JONES, HOCKER, SULLIVAN & ANGERT,
Counsel for Plaintiff in Error.

ST. LOUIS LAW PRINTING CO., 415 N. Eighth St. Bell, Main 1819.

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IN THE
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SAMUEL C. PANDOLFO,	}	No. 3589.
Plaintiff in Error,		
vs.		
BANK OF BENSON, a Corporation,		
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Defendants in Error.	}	

In Error to the District Court of the United States within
and for the District of Arizona, at Phoenix,
Honorable David P. Dyer, District Judge.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

This is an action for libel instituted by plaintiff in error against the defendants, which are banking corporations of the State of Arizona, and members of

the Arizona Bankers' Association, except the individual defendant, Morris Goldwater, who was the secretary of said Arizona Bankers' Association.

The original petition in this case was filed in the United States District Court within and for the District of Arizona, at Phoenix, on January 6, 1919. On April 14, 1919, an amended petition was filed in said cause, which (omitting caption and signatures) is as follows, to wit:

Amended Petition.

“Comes now the said plaintiff with leave of the Court first had, and files this, his amended petition, and alleges:

“That the plaintiff is a citizen of the State of Minnesota, residing in the County of Stearns, in said State.

“That the defendants, Bank of Benson, Bank of Bisbee, Citizens Bank & Trust Co., Miners & Merchants Bank, Buckeye Valley Bank, Casa Grande Valley Bank, Bank of Chandler, Bank of Duncan, Bank of Douglas, Arizona Central Bank, The Citizens Bank, Glendale State Bank, Security State Bank, Pinal Bank & Trust Co., Old Dominion Com. Co., Merchants & Stock Growers Bank, Holbrook State Bank, Bank of Jerome, Bank of Lowell, Mesa City Bank, Salt River Valley Bank, State Bank of Metcalf, Bank of Miami, Gila Valley Bank & Trust Co., State Bank of Morenci, Santa Cruz Valley Bank & Trust Co., Sonora Bank & Trust Co., Bank of Oatman, The Commercial Bank, Payson Com. & Trust Co., Central Bank of Phoenix, Citizens State Bank, Phoenix Savings Bank & Trust Co., Valley Bank, Bank of Arizona, Commercial Trust & Savings Bank, Yavapai County Savings Bank,

Bank of Safford, St. Johns State Bank, San Simon Valley Bank, Bank of Northern Arizona, Bank of Superior, Farmers & Merchants Bank, Citizens Bank, Merchants Bank & Trust Co., Southern Arizona Bank & Trust Co., Willeox Bank & Trust Co., Williams State Bank, Bank of Winslow and Arizona State Bank, are all banking corporations organized under the laws of the State of Arizona and citizens of said State, with their respective offices and places of business at the cities of Benson, Bisbee, Bisbee, Bisbee, Buckeye, Casa Grande, Chandler, Duncan, Douglas, Flagstaff, Flagstaff, Glendale, Glendale, Florence, Globe, Holbrook, Holbrook, Jerome, Lowell, Mesa, Mesa, Metcalf, Miami, Morenci, Morenci, Nogales, Nogales, Oatman, Parker, Payson, Phoenix, Five Points, Phoenix, Phoenix, Phoenix, Prescott, Prescott, Prescott, Safford, St. Johns, San Simon, Snowflake, Superior, Tempe, Thatcher, Tucson, Tucson, Willeox, Williams, Winslow and Winslow, in the State of Arizona.

“The defendants, First National Bank of Clifton, First National Bank of Globe, First National Bank of Douglas, First National Bank of Nogales, National Bank of Arizona, Phoenix National Bank, Prescott National Bank, Tempe National Bank, First National Bank of Tombstone, Arizona National Bank, Consolidated National Bank, First National Bank of Yuma and Yuma National Bank, are banking corporations organized under the laws of the United States, conducting their respective banking businesses at the cities of, respectively, Clifton, Globe, Douglas, Nogales, Phoenix, Phoenix, Prescott, Tempe, Tombstone, Tucson, Tucson, Yuma and Yuma, in the State of Arizona, and are all citizens of said

State, and that the defendant Morris Goldwater is a resident of the City of Prescott, in the State of Arizona, and a citizen of said State.

“Plaintiff states that at all the times hereinafter mentioned, and long prior thereto, the defendants were, and now are, banking corporations, duly organized and existing as aforesaid, and, as such, have long prior to the matters hereinafter referred to heretofore organized themselves into and at all the times herein mentioned, and now, conduct and operate a voluntary association known as the Arizona Bankers’ Association, of which all the defendants, at all the times hereinafter mentioned, and long prior thereto, were members, except the defendant Morris Goldwater, who is an individual and who at all the times hereinafter mentioned and long prior thereto was, and now is, the secretary of said Arizona Bankers’ Association.

“Plaintiff further states that said defendants, under said style of Arizona Bankers’ Association, were and are engaged in the business of printing and publishing a certain book and pamphlet called ‘Proceedings of the Arizona Bankers’ Association’, and that said defendant Morris Goldwater, as the secretary of said Arizona Bankers’ Association, knowingly acted with the said Arizona Bankers’ Association in printing and publishing and distributing the said book and pamphlet so printed and published containing said proceedings of said Arizona Bankers’ Association, to the public.

“That said book and pamphlet was at all such times printed and published yearly by said Arizona Bankers’ Association, assisted by Morris Goldwater, defendant, and was by them largely circulated throughout the states of Arizona, Texas, New Mexico, California and Illinois, and

particularly throughout the entire states of Arizona and New Mexico, where the plaintiff is well known, and throughout the United States of America generally, and was widely read by bankers and business men generally.

“Plaintiff states that he has at all times conducted and demeaned himself as an honest and upright citizen of the United States of America, and of the states of New Mexico, Texas and Minnesota, where he had resided during the past few years; that ever since the day of, 1917, he has been employed as the president of the Pan Motor Company, an automobile manufacturing company organized and existing under and by virtue of the laws of the State of Delaware, and having its principal office in the City of St. Cloud, in the State of Minnesota.

“Plaintiff further states that until the commission of the several grievances by the defendants hereinabove set forth he was well reputed, esteemed and accepted by and among his neighbors and acquaintances to whom he was known throughout the states hereinbefore mentioned, and throughout the United States, as a person of good name, fame and credit and as a business man and a corporation officer of honesty, integrity and fidelity.

“And plaintiff alleges that defendants, well knowing such fact, and intending, wickedly and maliciously, to injure the plaintiff in his good name, fame and credit as an individual and as a business man and corporation officer, and as such, to bring him into public hatred, scorn, ridicule, contempt, infamy and disgrace, and to deprive him of the benefits of public confidence, and to cause it to be believed by his business associates and among good and worthy citizens of the

United States that plaintiff had been guilty of corrupt, dishonest, dishonorable and criminal conduct in and about the discharge of his duties as a corporation officer and in and about the transaction of financial matters and as a business man, and in the transaction of insurance business in the State of Texas (in which he had been previously employed); and in order to cause it to be believed by said hereinbefore mentioned persons that the plaintiff had been guilty of criminal conduct and practices, of embezzlement and theft, and obtaining money under false pretenses in and about the transaction and discharge of financial matters; and in order to cause it to be believed by said persons hereinbefore mentioned, and the public generally, that the plaintiff had been guilty of a violation of the criminal laws of the states of Texas, New Mexico and Arizona, and had been guilty of the crimes of embezzlement, theft, larceny, obtaining money under false pretenses and of violating the insurance laws of the State of Texas, by directly or indirectly unlawfully taking, receiving or retaining moneys legally belonging to other persons, and of writing insurance in the State of Texas in violation of the law; and intending to vex, oppress, impoverish and wholly ruin the plaintiff, did, on or about the day of May, 1918, in Vol. X of the book or pamphlet known as the 'Proceedings of the Arizona Bankers' Association', publish and cause and procure to be published of and concerning the plaintiff a certain false, wicked, malicious, defamatory and libelous article, as follows, to wit:

“ ‘The Secretary: Mr. President, before you take up any other matters, I have a letter here that I want to read. This is a letter

addressed to the Secretary of the Arizona Bankers' Association and also to the Secretary of the New Mexico Association. It says: "Mr. Morris Goldwater, Secretary State Bankers' Association, Prescott, Arizona. Mr. J. C. Christensen, Secretary Bankers' Association, Raton, New Mexico.

Gentlemen: You have operating in Arizona and New Mexico one Mr. S. C. Pandolfo, who recently moved from San Antonio. I am writing you, gentlemen, with reference to this man Pandolfo, as he is a double-barreled crock. The Commissioner of Insurance of Texas revoked his license outright and refused him the privilege of writing insurance in Texas on account of him continuously violating the law. Our Banking Commissioner forbade state banks from buying paper from this fellow, or in any manner taking obligations in which he was interested.

He has crooked more people and in more ways than most any fellow we have ever had in this part of the country in a long time. I believe that it is only just to the bankers in your state that you tip them off to this fellow. If you do not he is certainly going to hang a lot of them before he is found out. He is one of the crookedest white men I have ever seen. His present address, I understand, is at Tucumcari, and he is promoting some kind of an Automobile Insurance Company, the results of which that he will be getting a lot of money out of the promotion, and the company will be broke about the time it shall begin its operation.

Yours very truly,

President."

It is such a letter that I did not care to put it in print and send it out as a warning, as I did not know but what I might be held up and libeled for something, so I thought I would read it here to you all.' ”

“And, having so published said false, defamatory and libelous matter of and concerning the plaintiff, the defendants circulated the same, and caused it to be circulated among business men, bankers and others throughout the States of Arizona, Texas, New Mexico, California, Illinois and other States of the United States.

“Plaintiff alleges that the defendants well knew that said statements so published of and concerning the plaintiff, as aforesaid, were absolutely false and untrue, and that the same were published with the malicious and express intent of defaming and injuring the plaintiff.

“Plaintiff further says that said book and pamphlet in which said libelous article was so published as aforesaid is a book and pamphlet of large circulation, as hereinbefore alleged, and is generally considered of great influence and power among banking institutions throughout the United States of America, and that the defendants, the publishers of said book and pamphlet, are reasonably worth more than fifty million dollars (\$50,000,000.00).

“**Wherefore**, plaintiff says that, by reason of the premises, he has been brought into public hatred, scorn, ridicule, contempt, infamy and disgrace; has been deprived of the benefits of public confidence, both as an individual and as a corporate employe and officer; has suffered great humiliation and mental pain and anguish, and has grievously suffered in his reputation, and has been damaged by the libelous publication so made

of and concerning him by the defendants, as aforesaid, in the sum of five hundred thousand dollars (\$500,000.00) as actual damages, and in the further sum of five hundred thousand dollars (\$500,000.00) as punitive damages, for which he prays judgment, with his costs.”

Thereafter, in due time, the defendants filed their separate motions to strike out portions of plaintiff’s said amended petition and separately demurred to said petition upon the ground that the same wholly failed to state facts sufficient to constitute a cause of action; which said motions to strike and demurrer are as follows (caption omitted):

“Come now the defendants named in the complaint herein, by their attorneys, Armstrong, Lewis & Kramer, and severing as to their defense, separately plead to the complaint of plaintiff herein, as follows:

Motions to Strike.

I.

“Each defendant moves the Court to strike from line 24, page 5 of the complaint, the words ‘criminal conduct’ as surplusage.

II.

“Each defendant further moves the Court to strike from the complaint the following words in lines 30, 31 and 32, page 5, and line 1, page 6, of the complaint, to wit, ‘criminal conduct and practices of embezzlement and theft, and obtaining money under false pretenses in and about the transaction and discharge of financial matters’ as surplusage.

III.

“Each defendant further moves the Court to strike from the complaint the following words in lines 2, 3 and 4, page 6 of said complaint, to wit: ‘that the plaintiff had been guilty of the violation of the criminal laws of the States of Texas, New Mexico and Arizona’ as surplusage.

IV.

“Each defendant further moves the Court to strike from the complaint the following words found in lines 4, 5 and 6, page 6 of said complaint, to wit: ‘and had been guilty of the crimes of embezzlement, theft, larceny, obtaining money under false pretenses’ as surplusage.

V.

“Each defendant further moves the Court to strike from the complaint the following words found in lines 7, 8 and 9, page 6 of said complaint, to wit: ‘by directly or indirectly unlawfully taking, receiving or obtaining moneys legally belonging to other persons’ as surplusage.”

DEMURRER.

“Without waiving said motions, each defendant separately demurs to said complaint upon the ground that said complaint wholly fails to state facts sufficient to constitute a cause of action as against it.

“Wherefore, each defendant prays that said complaint be dismissed as to it and that it recover its costs.”

Thereafter, on March 9, 1920, the separate demurrers and motions to strike filed by the defendants

came on for hearing in the United States District Court within and for the State of Arizona, at Phoenix, before Honorable David P. Dyer, Judge, and, after being duly argued and submitted, the Court duly sustained said demurrers and motions to strike, and struck out of plaintiff's amended petition the parts against which the defendants had moved, and also held that plaintiff's petition wholly failed to state any cause of action against the defendants.

Thereafter, plaintiff declining to plead further, final judgment was rendered dismissing the plaintiff's petition for the reason that the same wholly failed to state any cause of action and entering final judgment in favor of the defendants. From this final judgment the plaintiff duly sued out his writ of error to this Court and the cause as now pending in this Court involves simply the propriety of the action of the District Court in striking out portions of plaintiff's amended petition and in holding that plaintiff's amended petition wholly failed to state a cause of action against the defendants.

ASSIGNMENTS OF ERROR RELIED ON.

The errors of the United States District Court within and for the State of Arizona, relied upon by the plaintiff in error, are the following:

1. The Court erred in sustaining the motions to strike of the defendants below the following words from plaintiff's petition as surplusage, to wit:

(a) From line 24, page 5, "criminal conduct".

(b) From lines 30, 31 and 32, page 5, and line 1, page 6, "criminal conduct and practices of embezzlement and theft and obtaining money under false pretenses in and about the transaction and discharge of financial matters".

(c) From lines 2, 3 and 4, page 6, "that the plaintiff had been guilty of the violation of the criminal laws of the State of Texas, New Mexico and Arizona".

(d) From lines 4, 5 and 6, page 6, "and had been guilty of the crimes of embezzlement, theft, larceny, obtaining money under false pretenses".

(e) From lines 7, 8 and 9, page 6, "by directly or indirectly unlawfully taking, receiving or obtaining money legally belonging to other persons".

2. The Court erred in sustaining the demurrer of the defendants below to the petition of the plaintiff below and plaintiff in error herein.

POINTS AND AUTHORITIES.

I.

The District Court erred in sustaining defendants' motions to strike out parts of plaintiff's amended petition and in holding that the parts stricken out were surplusage.

Cyc, Vol. XXV, page 452;

Morrison v. Smith et al., 69 N. E. 725, 42 N. Y. Supl. 681;

White v. Parks et al., 93 Ga. 633, 20 S. E. 78.

II.

The trial court erred in sustaining defendants' demurrer to plaintiff's amended petition and in holding that plaintiff's amended petition wholly failed to state any cause of action as against defendants.

(a) A member of a voluntary association is responsible for the tortious acts committed by the association when it can fairly be assumed that they were within the scope of the purposes for which the organization was formed.

4 Cyc, 312, 313;

25 Am. & Eng. Ency. of Law, page 1138;

White v. Parks, 93 Ga. 633, 20 S. E. 78;

Muetze v. Tuteur, 77 Wis. 236, 46 N. W. 123,
9 L. R. A. 86;

Boutwell v. Marr, 71 Vt. 1, 42 Atl. 607, 43 L.
R. A. 803, 76 Am. St. Rep. 746;

Weston v. Barnicoat, 175 Mass. 454, 49 L. R. A.
613;

Vredenburg v. Behan, 33 La. Ann. 627;

Davison v. Holden et al., 55 Conn. 103, 10 Atl.
515;

Connell v. Stalker, 21 Misc. (N. Y.) 609;
Simmonds v. Southern Rifle Club, 52 La. Ann.
114;
April v. Baird, 32 N. Y. App. Div. 226;
McDowell v. Joice, 149 Ill. 124;
Coleman v. Coleman, 78 Ind. 344;
Lynch v. Postlethwaite, 7 Mart (La.) 69, 12
Am. Dec. 495;
Taft v. Ward, 106 Mass. 518;
Machinists National Bank v. Dean, 124 Mass.
81.

(b) In the absence of a statutory provision, suits against voluntary associations should be brought against the individual members, whether individuals or corporations.

Davison v. Holden et al., 55 Conn. 103, 10 Atl.
515;
State ex rel. Attorney-General v. Kansas City
Live Stock Exchange et al., 109 S. W. 675;
American Steel Co. v. Wire Drawers Union,
90 Fed. 598.

(c) The assent of members of a voluntary association may be presumed where the act committed is in furtherance of the common purpose or object of the association.

5 Corpus Juris 1364, Note 30, Subdivision C.

(d) Demurrer will not lie against a complainant because it fails to allege that the words complained of were uttered by authority of the corporation, or that the utterances were subsequently ratified.

Vol. V, Fletcher's Cyclopedia Corporations,
page 5245.

ARGUMENT.

The sole question to be reviewed upon this writ of error is the action of the trial court in striking out portions of plaintiff's amended petition and in sustaining the demurrer to plaintiff's amended petition, for the reason that the same was held by the trial court not to state any cause of action as against the defendants, or any of them.

I.

Motions to Strike.

Defendants' motions to strike certain allegations of plaintiff's petition were based on the ground that the matter sought to be eliminated from the amended petition is unnecessary innuendo, but we contend were not well taken, and should have been overruled by the trial court.

Defendants, in support of their motions to strike, in the trial court, cited 25 Cyc 452, where it is said:

“The innuendo may be treated as surplusage where it is used in connection with **words which are unequivocal** and actionable *per se*, and it is held that where plaintiff in an action has, by innuendo, put a meaning upon the alleged defamatory publication which is not supported by its language or proof, the Court may nevertheless submit the case to the jury, if the publication is defamatory *per se*. But where the communication is not actionable *per se*, and the innuendo is used to impute a defamatory meaning, plaintiff is bound by the construction which he has given to the words in the innuendo.”

It is difficult to see where the above ruling, if observed, warrants the striking out of the language in the petition, or, in other words, the innuendo which is sought to be stricken. The gist of the matter complained of in the petition is a letter addressed to the secretary of the defendants' association which was read to the association and by officers of the association caused to be published in the volume of that year's proceedings of the association. The letter is set out in the petition, and in effect says:

"I am writing you, gentlemen, with reference to this man Pandolfo as he is a double barrelled **crook**. * * * He has **crooked** more people and in more ways than most any fellow we have ever had in this part of the country in a long time. * * * He is one of the **crookedest** white men I have ever seen."

The word "crook" used in the letter has various meanings (Mr. Webster defines it "a person given to fraudulent practices, an accomplice of thieves, forgers, etc.), and needs explanation as to what the writer of the letter intended to imply by its use, and, therefore, it was and is proper for the plaintiff in using the innuendo in his petition which he deemed the words "crook" and "crooked" used meant, to characterize the particular kinds of dishonesty that the terms "crook" and "crooked" implied.

The New York Court of Appeals, in the case of *Morrison v. Smith et al.*, 69 N. E. 725, passing on the use of innuendo in a petition for libel upon an article libelous *per se*, held where an article is libelous *per se* the case should be submitted to the jury, though

plaintiff has by innuendo put a meaning on the alleged libelous publication which is not supported by its language or proof.

Also, to the same effect, see

White v. Parks et al., 20 S. E. 78;
Cyc, Vol. XXV, page 452.

In view of the foregoing rule and authorities, the motions to strike ought to have been denied.

II.

DEMURRER.

As to the demurrer of the defendants, which is general and by which all of the plaintiff's allegations in his amended petition, which are well pleaded, are admitted, we respectfully submit that the demurrer is not well taken, and should have been overruled.

The demurrer and the ruling of the trial court seem to be based upon a misapprehension of the allegations of the amended petition. The amended petition does not charge a copartnership to exist between the defendants, but merely a voluntary association composed of various corporations, among its objects and purposes being to print and publish a book or pamphlet called "Proceedings of the Arizona Bankers' Association". The amended petition expressly charges that the defendants, under the name of the Arizona Bankers' Association, were engaged in the business of printing and publishing a certain book or pamphlet called the "Proceedings of the Arizona Bankers' Association", and in which book or pamphlet the libelous article is contained and published.

Under such circumstances a member of a voluntary

association is responsible for the tortious acts committed by the association when it can fairly be assumed that they were within the scope of the purposes for which the organization was formed.

4 Cyc 312;

25 Am. & Eng. Enceyc. of Law, page 1138;

White v. Parks, 93 Ga. 633, 20 S. E. 78;

Muetze v. Tuteur, 77 Wis. 236, 46 N. W. 123,
9 L. R. A. 86;

Boutwell v. Marr, 71 Vt. 1, 42 Atl. 607, 43 L.
R. A. 803;

Vredenburg v. Behan, 33 La. Ann. 627;

Davison v. Holden et al., 55 Conn. 103, 10
Atl. 515;

Weston v. Barnicoat, 175 Mass. 454, 49 L. R.
A. 613;

Connell v. Stalker, 21 Misc. (N. Y.) 639;

Simmonds v. Southern Rifle Club, 52 La. Ann.
114;

April v. Baird, 32 N. Y. App. Div. 226;

McDowell v. Joice, 149 Ill. 124;

Coleman v. Coleman, 78 Ind. 344;

Lynch v. Postlethwaite, 7 Mart (La.) 69, 12
Am. Dec. 495;

Taft v. Ward, 106 Mass. 518;

Machinists National Bank v. Dean, 124 Mass. 81.

In the absence of statutory provisions, suits against voluntary associations should be brought against the individual members, whether individuals or corporations.

Davison v. Holden et al., 55 Conn. 103, 10
Atl. 515;

State ex rel. Attorney-General v. Kansas City
Livestock Exchange et al., 109 S. W. 675;

American Steel Co. v. Wire Drawers Union, 90
Fed. 598.

The assent of members of a voluntary association may be presumed where the act committed is in furtherance of the common purpose or object of the association.

5 Corpus Juris 1364, Note 30, Subdivision C.

In this case one of the common purposes of the defendants' association was to publish the book in which the libelous article was contained and published.

Demurrer will not lie against a declaration because it fails to allege that the words complained of were uttered by authority of the corporation, or that the utterances were subsequently ratified.

Vol. V, Fletcher's Cyclopedia Corporations,
page 5245.

There is nothing which appears on the face of the amended petition in this case that shows or could be construed to show that the libelous article is a privileged communication, and therefore we deem it unnecessary to answer defendants' argument advanced in the trial court on that point of their demurrer.

For all of the reasons above enumerated, we earnestly insist that the District Court erred in sustaining defendants' motions to strike out parts of plaintiff's amended petition, and in sustaining the defendants' demurrer and holding that plaintiff's amended petition wholly failed to state any cause of action against the defendants. For these reasons the Court erred in rendering final judgment in favor of the de-

fendants, and the judgment should, therefore, be reversed and the cause remanded so that a trial thereof may be had.

Respectfully submitted,

JONES, HOCKER, SULLIVAN & ANGERT,
Counsel for Plaintiff in Error.

—IN THE—

**United States Circuit Court of Appeals
for the Ninth Circuit**

SAMUEL C. PANDOLFO,

Plaintiff in Error,

vs.

BANK OF BENSON, a Corporation, et al.,

Defendants in Error.

No. 3589

IN ERROR FROM THE DISTRICT COURT OF THE UNITED
STATES WITHIN AND FOR THE DISTRICT OF ARIZONA,
AT PHOENIX, HONORABLE DAVID P. DYER, DISTRICT
JUDGE.

Brief of Defendants in Error

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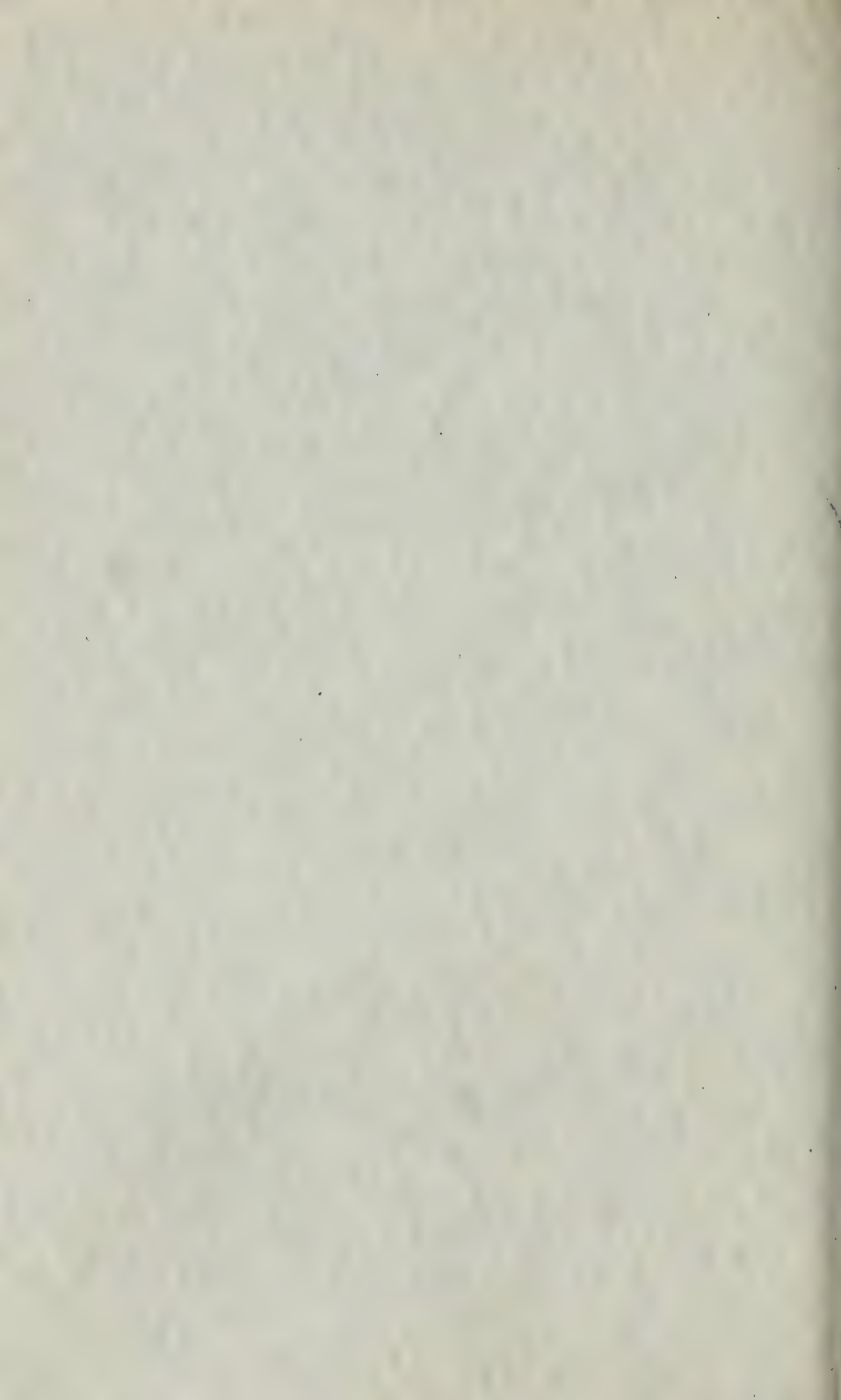
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CLERK.

Filed this..... day of....., 192.....

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By.....
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—IN THE—

United States Circuit Court of Appeals for the Ninth Circuit

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Defendants in Error.

No. 3589

Brief of Defendants in Error

— — — — —

STATEMENT OF CASE.

Writ of error to reverse a judgment rendered in favor of the defendant below and the defendant in error herein dismissing the complaint of the plaintiff below and the plaintiff in error herein with costs to the defendant below. Said judgment was rendered on failure of the plaintiff below to amend his complaint; the lower court on hearing having granted the defendants' motion to strike certain portions of the plaintiff's complaint and having sustained the defendants' demurrer to said complaint.

BRIEF AND ARGUMENT.

There are two assignments of error sub-divided into six reasons why the judgment should be reversed. The first assignment, containing five subdivisions, assigns error on the part of the court in sustaining the motions to strike of the defendants below certain words from plaintiff's petition as surplusage. The second assignment assigns error on the part of the court in sustaining the demurrer of the defendants below to the petition of the plaintiff below and plaintiff in error herein.

We shall take them up in the order assigned.

I.

MOTIONS TO STRIKE.

According to the contention of counsel for the plaintiff in error in their Brief on Page 16, the effect of the alleged libelous letter set out in the plaintiff's petition is as follows:

“I am writing you, gentlemen, with reference to this man Pandolfo as he is a double-barrelled *crook*. * * * He has *crooked* more people and in more ways than most any fellow we have ever had in this part of the country in a long time. * * * He is one of the *crookedest* white men I have ever seen.”

The innuendos, which the court ordered to be stricken as surplusage and the striking of which are assigned as error, attempted to give to these words the following meanings:

(a) On line 24, page 5—“Criminal conduct”.

(b) On lines 30, 31 and 32, page 5, and line 1, page 6,

“Criminal conduct and practices of embezzlement and theft and obtaining money under false pretenses in and about the transaction and discharge of financial matters.”

(c) On lines 2, 3 and 4, page 6.

“That the plaintiff had been guilty of a violation of the criminal laws of the States of Texas, New Mexico and Arizona.”

(d) On lines 4, 5 and 6, page 6.

“and had been guilty of the crimes of embezzlement, theft, larceny, obtaining money under false pretenses.”

(e) On lines 7, 8 and 9, page 6.

“by directly or indirectly unlawfully taking, receiving or obtaining money legally belonging to other persons.”

The province of the innuendo in the law of defamation is well stated in *Wallace vs. Homestead Company* (Iowa) 90 N. W. at 840.

“An innuendo is not an averment, but only matter of explanation. It means nothing more than the words ‘id est’, scilicet’, or ‘meaning’, or ‘aforesaid’ as explanation of a subject-matter sufficiently expressed before; * * * * An innuendo cannot extend the sense of the expressions in the alleged libel beyond their own meaning. Where the words used are ambiguous or admit of different applications, an innuendo may confine or direct them, but cannot extend the intendment of an expression beyond the customary meaning. If this were not true, an explanation of antecedent matter would be converted

into a direct averment. The words themselves, in the absence of ambiguity, must be taken in that sense in which they would naturally be understood by those who read and understood them.”

We note that in the 1911 Edition of Webster’s New International Dictionary of the English Language, the definition of “crook” and allied words used is perhaps more moderate than the definition quoted by counsel for plaintiff in error in their brief.

“Crook, n. (6) A person given to crooked or fraudulent practices; a swindler, sharper, thief, forger, or the like.

Crook, v. (3) To turn from a straight or right course or path.

Crooked, a. (2) Not straightforward; deviating from rectitude; distorted from the right.

They are a perverse and crooked generation.
Deut. XXXII, 5.

(3) False; dishonest; fraudulent; as crooked dealings.”

In general these definitions tend to give to these words a meaning of sly dishonesty, trickery, and swindling. When one is warned against a crook he is warned against the sharp tricks and unethical business practices, that might separate him from his money if not on his guard. People have not, however, given to these words the hue of criminality which the plaintiff has set up in his innuendos. People commonly think of a crook as one who has deviated from the paths of truth, uprightness and business dealings beyond reproach, as one who is given to shady practices, but not as one who has as yet stepped across the line into criminality. He may be skating on thin ice, but he has not actually broken the law. The meaning which the plaintiff has attempted to

give to these words, namely, criminal conduct and practices, embezzlement, theft, obtaining money under false pretenses, violation of the criminal laws of Texas, New Mexico and Arizona, larceny, directly or indirectly unlawfully taking, receiving or obtaining money legally belonging to other persons, are utterly unreasonable and outside of any ordinary meanings which popular usage ascribe to such words.

We submit that the reasonable meaning of the alleged libelous words will not support the meaning sought to be attached thereto by the plaintiff in the innuendos contained in his amended petition. This being true the innuendos were surplusage and the lower court correctly permitted them to be stricken out on proper motion. In order to uphold the action of the court below in granting the motion to strike it is not necessary to determine whether the alleged libelous language was or was not libelous per se. If the statements were libelous per se nevertheless innuendos giving an utterly unreasonable interpretation to them would be surplusage, and the same would be true if the language was not libelous per se. It is only an innuendo assigning a reasonable construction or meaning to alleged libelous statements which can survive a motion to strike. The lower court construed the alleged libelous words in their plain, popular sense, the sense in which people would naturally understand them, and decided that in no event could they be given the meaning attached to them by the plaintiff.

Brinsfield v. Howeth, (Md.) 68 Atl. 566.

“If there was a local or provincial use of the word which gave it the meaning contended for, or if there were extrinsic circumstances by reason of which it was so understood by the hearers at the

time the words were uttered, these facts should be alleged by way of inducement. Newell, Slander and Libel (2d Ed.) 603. The innuendo cannot enlarge the natural and ordinary meaning of the words."

Bearce et al., vs. Bass, (Maine) 34 Atl. at 414.

"The rule is too well settled to need citation of authority that an innuendó 'is only explanatory of some matter already expressed. It serves to point out when there is precedent matter, but never for a new charge. It may apply to what is already expressed, but cannot add to or enlarge or change the sense of the previous words.' 1 Chit. Pl. 407; 1 Wms. Saund, 243a, note 4; *Emery v. Prescott*, 54 Me. 389.

It is the province of the court to determine, in the first instance, whether the language published is reasonably susceptible of the meaning ascribed to it by the plaintiffs' innuendo."

Scofield vs. Milwaukee Free Press et al. (Wisconsin) 105 N. W. 227.

"We have already said enough to indicate our view that the words themselves, without any elucidation by way of innuendo, as to the charge intended, are capable of a defamatory and libelous meaning. Hence the assertion in one part of the complaint that they served to charge a crime, if untrue, may be disregarded as mere surplusage."

Labor Review Pub. Co. vs. Galliher (Alabama) 45 So. 188.

Fitzpatrick vs. Age-Herald Pub. Co. (Alabama) 63 So. 980.

Posnett vs. Marble, (Vermont) 20 Atlantic, 813.

The cases cited by counsel for plaintiff in error are not in point. *Morrison vs. Smith et al.*, 69 N. E. 725,

did not come up on a motion to strike. The decision in that case merely holds that if the plaintiff at the trial could not prove that the innuendo pleaded was a reasonable interpretation of the words, she should not fail but should be entitled to make the defendants defend against the plain import of the words which were libelous per se. In other words the fact that the plaintiff had pleaded an innuendo which was impossible to support, would not prejudice her and the case was permitted to be tried on the reasonable construction of the alleged libelous words. The court said:

“If no innuendo was necessary to be averred in the complaint in order to state a cause of action, then her averment of a libelous meaning by innuendo was surplusage.”

The question did not come before the New York court, as it comes in the instant case, on a motion to strike and eliminate innuendos set up by the plaintiff, where the interpretation chosen by the plaintiff would not on any possibility be naturally conveyed to persons of ordinary understanding. In the New York case the construction alleged by the plaintiff was that “the meaning of this advertisement was that the plaintiff had been the subject of an unchaste and indecent experience.” At the trial a motion to dismiss the complaint was granted upon the ground that the words could not be given the construction placed upon them by the plaintiff. The Appellate Division affirmed the judgment of dismissal on the ground that the plaintiff had tendered an issue as to whether the words used were “susceptible per se of the interpretation that they charge her with unchastity” and that the plaintiff had failed “to sustain the burden thus placed upon her.” The Court of Appeals reversed the judgment and ordered a new trial.

The Court went so far as to characterize as “surplusage” the averment of a libelous meaning which could not be supported by the reasonable meaning of the words.

We submit that if the case had come before the New York Court of Appeals, on appeal assigning error to the lower court because it sustained a motion of the defendants to strike the averment as “surplusage”, the New York Court of Appeals would have dismissed the appeal.

The other case cited by counsel as authority for the proposition that the motions to strike ought to have been denied is also not in point. It did not come up on a motion to strike and the court did not by way of decision of dicta advert to the question raised by the motions to strike in the instant case.

In view of the foregoing facts and the authorities cited, the lower court did not commit error in granting the motions to strike.

II.

DEMURRER.

This suit is brought against banking corporations alleged to have organized themselves into and to conduct and operate a voluntary association known as the “Arizona Bankers’ Association”. (Transcript of Record, page 5.)

The limit of liability of members of an unincorporated association is that the members are responsible for tortious acts committed by the society where it can fairly be assumed that they were within the scope of the purpose for which the organization was formed.

No such allegations of fact appear in the complaint.

It cannot be assumed that the purpose of the formation of the Arizona Bankers' Association was to engage "in the business of printing and publishing a certain book and pamphlet called 'Proceedings of the Arizona Bankers' Association'." In fact the title of the book or pamphlet shows that it merely sets out to be an account of the proceedings of the Association. The purpose for which the organization was formed would naturally be to promote the welfare of banks and banking within the state and the publication of an account of the proceedings of the Association is not a matter within the scope of the purpose of the organization for which all the members can fairly be said to be responsible.

One member of an association cannot by his unauthorized acts impose on another member a liability for tort.

The syllabus in *Master Builders Ass'n. et al., vs. Domascio*, (Colo.) 63 Pac. 782, states:

'2. A notification by a builder to an architect that, if he should receive plaintiff's bid for work, numerous members of a master builders' association would refuse to bid thereon, would not authorize a judgment against such members, in the absence of any evidence to show authority of the builder to give such notice.'

The vice in the pleading of the plaintiff's cause of action in his amended complaint is clearly shown by an attempt to analyze the allegations in regard to publication, in order to find out when the publication of the alleged libelous matter was made, by whom it was made and by whose authority it was made.

The amended complaint states that the "defendants, under the said style of Arizona Bankers' Association,

were engaged in the business of printing and publishing a certain book and pamphlet called 'Proceedings of the Arizona Bankers' Association' and that the defendant, Morris Goldwater, as the secretary of said Arizona Bankers' Association, knowingly acted with the said Arizona Bankers' Association in printing and publishing and distributing the said book and pamphlet so printed and published containing said proceedings of said Arizona Bankers' Association to the Public. (See Transcript of Record, page 6.)

In the next paragraph of the amended complaint, it is alleged that "said book and pamphlet was at all such times printed and published yearly by said Arizona Bankers' Association assisted by Morris Goldwater, defendant, and was by them largely circulated throughout the States of Arizona, Texas, New Mexico, California and Illinois, and particularly throughout the entire states of Arizona and New Mexico, where the plaintiff is well known, and throughout the United States of America, generally." (Transcript of Record, page 6.)

It is interesting to note that in the first of the foregoing quotations the *defendants under the style of Arizona Bankers' Association*, printed and published the book, and that defendant, *Morris Goldwater*, as Secretary of the Association, *acted with the Arizona Bankers' Association* in printing, publishing and *distributing* the book. From this it can be gathered that all the defendant banks printed and published the book but the distribution was the act of the Association and its Secretary only.

The plaintiff alleges that the *defendants* on or about the.....day of May, 1918, published the alleged defamatory article in Vol. 10 of the book known as the "Proceedings of the Arizona Bankers' Association" setting it out in full.

The next paragraph of the amended complaint alleges “And, having so published said false, defamatory and libelous matter of and concerning the plaintiff, the defendants circulated the same and caused it to be circulated among business men, bankers and others throughout the States of Arizona, Texas, New Mexico, California, Illinois and other States of the United States.” (Transcript of Record, pages 9 and 10.)

The pleadings do not specify the theory on which the plaintiff bases his cause of action. Was it the publication of the alleged defamatory matter in the book which is the gist of the plaintiff's cause of action, or is the gist the circulating of the published volume? It is not alleged whether the circulating was done by the defendant Morris Goldwater as Secretary, and the defendant banks are liable as principals for his act as agent, or whether the circulating was done by certain of the defendant banks, and the other members of the association are to be held liable for the tortious acts which they are not alleged to have authorized or ratified. These questions are vital in regard to the question of malice. If the defendant banks are being held liable on the ground of agency, perhaps they can be held responsible for the malice of their common agent, but we know of no rule of law by which in an offence requiring malice, the malice of one can be imputed to another in order to constitute that one a joint tortfeasor.

There is authority for the proposition of law that one partner in a commercial firm has no authority to bind the firm by the gratuitous publication of a libel and by analogy we submit that one member of a voluntary association cannot bind the other members by the gratuitous publication of a libel.

In *Woodling vs. Knickerbocker*, 31 Minn. 268, 17 N. W. 387, the defendants were dealers in furniture.

The plaintiff purchased a table and returned it as unsuitable. The defendants placed the table outside their store placing on it libelous placards concerning the plaintiff. The court said:

“One can be held liable for a libel published by another only because he has authorized him to make the publication. There is nothing in the nature of the business of this firm—that of dealing in furniture or draperies—from which authority to one partner or to a servant to gratuitously publish a libel can be implied.”

In *Frizzell vs. Woodman Publishing Co.*, 130 S. W. 695, the defendants were partners in the publication of the “Woodman Journal”, a periodical published monthly in the interests of the “Sovereign Camp Woodmen of the World”, but only one of the defendants had done any act furthering such publication within the period of one year fixed by the statute of limitations. It was held that he only, and not the other defendants, was liable.

The law is clear in regard to non-business associations, i. e., associations not formed for the purposes of pecuniary profit, that the individual liability of a member on a contract made by the association or committees depends upon the application of the law of agency, and authority to create such liability will not be presumed or applied from the existence of a general power to attend to or transact the business or promote the objects for which the association was formed, except where the debt contracted is necessary for its preservation.

Richmond vs. Judy, 6 Mo. App. 465, states:

“Associations and clubs, the objects of which are social or political and not for purposes of trade or

profit, are not partnerships, and pecuniary liability can be fastened upon the individual members of such associations only by reason of the acts of such individuals or of their agents; and the agency must be made out—none is implied from the mere fact of association.”

We submit that the same principles apply to the torts of members of a voluntary non-business association. Liability for torts can be fastened upon the individual members only by reason of the acts of the said individuals or of their agents. This agency must be made out and none will be implied from the mere fact of association.

We submit that it cannot be contended that the Arizona Bankers' Association was a partnership. The Supreme Court of the United States has held that it is ultra vires for a National Bank to become a member of a co-partnership.

Merchants National Bank vs. Wehrmann, Executrix,
202 U. S. 295, 50 L. Ed. 1036.

The same prohibition extends to corporate State banks. See Bowles Banking, page 29.

Note 30, Subdivision C, 5 Corpus Juris, 1364, referred to on Page 19 of the Plaintiff's in Error brief, has to do with constructive assent in cases of contract. “It has been suggested that the member constructively assents to the contract when it is in furtherance of the common object and purpose of the association.” However, it would be a very different matter for the law to say that the law presumes that a member of an association assents to a tort committed by a fellow member. That is the constructive assent which will have to be implied in the instant case. If it could be assumed that all the members constructively assented to the publi-

cation of the alleged libelous letter in the annual of the association on the ground that it was an act in furtherance of the common purpose or object of the association, that assumption will not be sufficient. That does not seem to be the publication for which the plaintiff is claiming damages. The subsequent circulation of the annual among business men seems to be the gravamen of the plaintiff's complaint. Certainly no court will assume that every bank constructively assented to the wrongful circulating of the annual by other banks. The complaint does not allege that each subsequent publication was expressly authorized by every defendant bank. Without such averment the only alternative is for the law to presume that every one of the many defendants constructively assented to the wrongful circulating of the annual by the banks which actually made the publication.

Counsel for the plaintiff in error in their brief make the bold statement that there is nothing which appears on the face of the amended petition that shows or could be construed to show that the libelous article is a privileged communication. With this interpretation of the amended complaint we disagree most emphatically. The original publication of the alleged libelous letter was made by the Secretary of the Association to the members in meeting assembled.

We submit that that publication was privileged on the grounds of common interest, self defense and self protection. The publication in the annual was privileged for the same reason. Whether specific publications alleged to have been made later throughout certain states of the United States were privileged depends on the relationship existing between the banks making the publication and the individual or corporation to whom the publication was made. It cannot be said that as a matter of

law there is nothing which can be construed to show that the publication was privileged.

A case which discusses clearly and concisely, matters raised by the demurrer in the instant case is *Warner vs. Missouri Pacific R. R. Co.*, 112 Fed. 114, decided by the Circuit Court of Western District of Tennessee in 1901. The following extracts from the decision show the questions which were raised in the court's mind and the reasoning in regard to the correct legal principles applicable thereto.

“It is important to examine the exact averments of this declaration in that behalf. It opens on this point: ‘That on the 18th day of June, 1899, the said defendants (the three associated corporations being the only defendants) wrote and published of and concerning the plaintiff the following false, malicious and defamatory letter, with intent to defame the plaintiff’. It closes on the same point thus: ‘Plaintiff avers that said libelous writing is false; that the same was made and published of the plaintiff by the defendants falsely and maliciously, with the deliberate intent and purpose to defame him, the said plaintiff.’

There are no facts stated in the declaration tending to show any malice, except such as may be implied from the face of the privileged communication itself, and such as may be implied from the averment, that it was published by the defendant, no matter how. It is not in any way shown how it was published, except by the letter of the superintendent to the addressee, and as to the writer no ill will or express malice is anywhere averred. ‘A complaint showing on its face that the alleged libelous publication is privileged will be demurrable, notwithstanding an allegation that the publication was false and malicious. If a publication is privileged, express malice must be averred. It is not sufficient to allege that the language used was false and malicious, but

it must be averred that the defendant acted maliciously'. 13 Enc. Pl. & Prac. 59.

Now, how is it to be averred that a defendant corporation 'acted maliciously'? And how is this 'express malice' to be proved? Clearly, even as between mere individuals, the opening clause of the declaration falls within the condemnation of the paragraph just cited from the Encyclopedia. Does the other clause of the declaration meet the requirements of the law of pleading, as stated in the Encyclopedia? Is the second clause any different from the first? There is some difference in the phrasing of the words, but nothing more, unless a difference is to be found in the use of the word 'deliberate' in the second clause not found in the first, and the addition of the word 'purpose' in conjunction with 'intent'. I have wished to trace the cases out, both as to individuals and corporations, to see how 'express malice' is averred, but the reports rarely give the pleadings, and it is difficult to do so in busy times, for either court or counsel.

If we turn, now, to the great case of *Railway Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97, we find, in a case where a conductor grossly maltreated a passenger with every circumstance of contumely and disgrace, that the court decided that a railroad corporation is not liable to exemplary or punitive damages for an illegal, wanton, and oppressive arrest of a passenger by the conductor of one of its trains, which it has in no way authorized or ratified.' And in the subsequent and equally great case of *Gaslight Co. v. Lansden*, 172 U. S. 534, 19 Sup. Ct. 296, 43 L. Ed. 543, the same ruling was applied in a libel case based on a personal letter written by the defendant corporation's 'general manager'. The court said:

'In this case no specified authority was pretended to have been given the general manager, Leitch, to write the letters which he sent to Brown, or to authorize the publication of any-

thing whatever in the periodical named. We are, then, limited to an inquiry whether the evidence is sufficient upon which a jury might be permitted to base an inference that Leitch had the necessary authority to act for the company in this 'business'. 172 U. S. at page 544, 19 Sup. Ct. at page 300, and 43 L. Ed. at page 548.'

This was said both as to compensatory and punitive damages, and the corporation was given a new trial.

Neither of these rulings arose upon a question of pleading, but one cannot read these and other cases without seeing that they are developments of the law of malice as applied to corporations, and are intended to correct misunderstandings prevalent in adjudicated cases. On the general principles of pleading, whether at common law or under our modern codes such a condition of limitation on the liability of a corporation for the express malice of its agents should require, and does, in my judgment, a special averment of authority or of ratification, or else such a special statement of facts as would on their face show by the averments that authority or ratification is to be reasonably applied. This kind of pleading would save long trials of insubstantial suits, and that is what pleadings are intended to do. The general averment that a corporation 'acted maliciously' is inappropriate to its limited liability and incongruous in fact. It does not give a defendant corporation notice of what it has to meet with regard to its dealings with its agents that should bind it to a liability for them on account of their malicious acts. It is appropriate enough as to an individual, or as to the agent of a corporation, in a personal suit against him, to say that he 'acted maliciously', but a corporation cannot 'act maliciously'. It only authorizes its agents to do so, and this authority is the substantive averment; or it ratifies the act of the agent, and this ratification becomes the substantive aver-

ment; or else the substantive averment is to be found in a 'statement of facts' which shows on the face of that statement that the authority or ratification is to be implied. Nothing like either of these is shown in this declaration, and on that theory the demurrers should be sustained."

Candor compels us to state that in spite of the irrefutable arguments in the decision the court did not sustain the demurrer. We submit that the cogent reasoning of the above decision applies even more directly to the instant case. In the amended complaint there is no averment of ill will or malice on the part of any agent which could be imputed to the defendant corporation, nor are particular facts pleaded which would tend to show express malice on the part of any agent which could be imputable to the corporation because of his authority to make the corporation responsible for his express malice. The amended complaint is to the effect that "defendants * * * intending, wickedly and maliciously, to injure the plaintiff in his good name, fame and credit * * * did * * * publish a certain false, wicked, malicious, defamatory and libelous article." (Transcript of Record, pages 7 and 8) and also "that the defendants well knew that said statements * * * were absolutely false and untrue, and that the same were published with the malicious and express intent of defaming and injuring the plaintiff." (Transcript of Record, page 10.)

A corporation can only act through its agent and a corporation can only act maliciously by authorizing or ratifying the express malice of a particular agent. We submit that a complaint which is silent in regard to the agent and merely states that the corporation "maliciously intended" and acted with "malicious intent" is fatally defective.

Counsel for plaintiff in error in their brief quote from Vol. 5, Fletcher's Cyclopedia Corporations, page 5245, as authority for the proposition that a demurrer will not lie against a declaration because it fails to allege that the words complained of were uttered by authority of the corporation or that the utterances were subsequently ratified. The case cited by the text writer is *Hopkins Chemical Co. vs. Reed Drug and Chemical Co.*, 124 Md. 210, 92 Atl. 478. The declaration in that case alleges that the "defendant, its agent or agents, * * falsely and maliciously spoke to one" * * * the alleged defamatory words about the plaintiff's tooth paste. The declaration alleges that the words were spoken by an agent of the defendant company and the facts alleged show sufficiently that the agent was acting in the course of his master's service and for his master's benefit, and within the scope of his employment. In the instant case there is no allegation that the subsequent publications were made by any agent of the corporations. The corporations only could act through agents, but there are absolutely lacking any averments sufficient to sustain the inference that in making a subsequent publication the act of such agent was within the general scope of his employment and that it was not merely the result of his own personal malice.

We respectfully submit that the lower court was correct, both in granting the defendants motions to strike and in sustaining the demurrer, and therefore the judgment should be affirmed.

THOS. ARMSTRONG, Jr.,
ERNEST W. LEWIS,
R. Wm. KRAMER,
Attorneys for Defendants in Error.

No. 3590

United States
Circuit Court of Appeals
For the Ninth Circuit.

EMIL HOOF,

Plaintiff in Error,

vs.

PACIFIC AMERICAN FISHERIES, a Corpora-
tion,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.

FILED

DEC 8 - 1920

F. D. MONGKTON,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

EMIL HOOF,

Plaintiff in Error,

vs.

PACIFIC AMERICAN FISHERIES, a Corpora-
tion,

Defendant in Error.

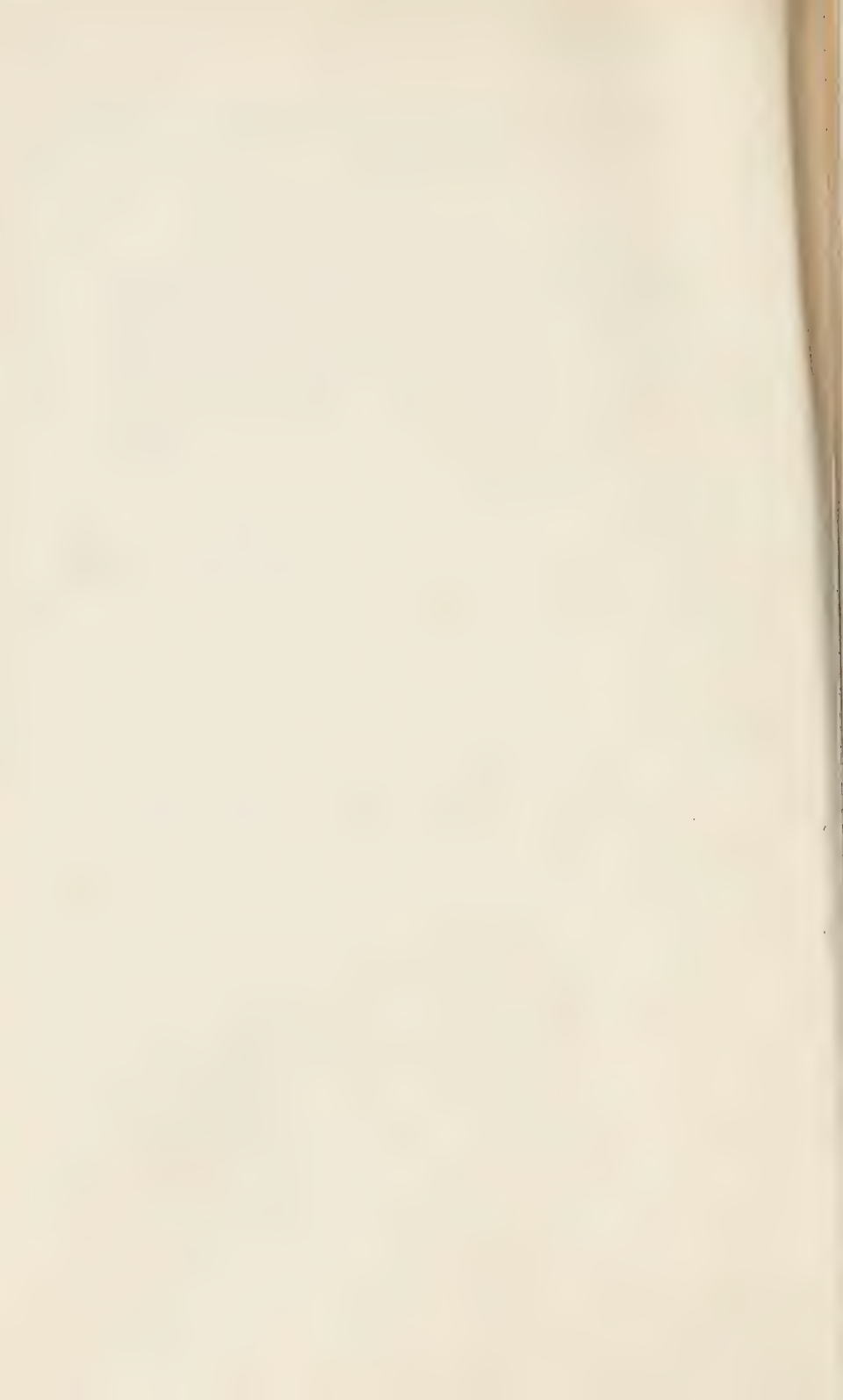
Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Counsel.

THOS. R. WATERS, Esq., Attorney for Plaintiff
in Error,

Bellingham, Washington.

Messrs. PERINGER & THOMAS, Attorneys for
Plaintiff in Error,

Bellingham, Washington.

Messrs. KERR & McCORD, Attorneys for Defendant
in Error,

Hoge Building, Seattle, Washington. [1*]

In the Superior Court of the State of Washington
in and for the County of Whatcom.

No. 14,163.

EMIL HOOFF,

Plaintiff,

vs.

PACIFIC AMERICAN FISHERIES, a Corporation,
ration,

Defendant.

Complaint.

Comes now the plaintiff and for cause of action
against the defendant alleges:

I.

That during all times herein mentioned the
plaintiff was and is a citizen of the United States
of America, residing at Bellingham, Washington,
therein, and that the defendant is a foreign corpo-

*Page-number appearing at foot of page of original certified Transcript
of Record.

ration engaged, among other things in the taking and canning of salmon and building of ships at Bellingham, Washington, for the United States of America, on a cost plus basis.

II.

That on the 16th day of April, 1919, and for a long time prior thereto, the plaintiff was employed by the defendant herein in the capacity of watchman on said ships it had built for the Government and which were launched but had not been put into actual commission.

III.

That on or about this day aforesaid at about 11:30 P. M. of said day, while plaintiff was employed by the defendant as aforesaid and in the actual discharge of his duties in the course of his employment was making the rounds as watchman on a vessel or ship built by the defendant for the Government but not yet completed for the Government and generally known and designated as "Cleo," attempted to descend from the forward bridge deck thereof to the forward main deck below by means of steps which had been prepared and placed there by the defendant for that purpose. That said [2] steps at this time were not protected by a hand-rail or secured to the bridge deck or main deck of said vessel in any manner whatsoever; that there were two such steps on said vessel, one aft and one forward, leading from the bridge deck to the main deck, and the plaintiff, in the course of his duties and exercising due care

for his safety, at this time was attempting to descend from said bridge deck on the forward steps leading to the main deck.

IV.

That the plaintiff started to go down said steps stepping forward with his right foot on the first step, and as he was lifting his left foot preparatory to stepping thereon, the said steps slipped upon the floor of the main deck of said vessel, which had just been freshly oiled that day, and upon slipping, said steps swerved and fell to the main deck, thereby violently throwing plaintiff to said deck, where he fell on his back.

V.

That it was the duty of said defendant to securely fasten said steps to the main deck of said vessel, so that same could not have slipped or fallen, and the plaintiff at the time he attempted to use the same as aforesaid believed them to be so secured and fastened and did not know that said floor, upon which said steps rested, had been oiled, or that the steps were not fastened and believed that he could use the same in safety, and had no reason to believe otherwise than that the defendant company had furnished him a safe place in which to perform his duties as aforesaid.

VI.

That at this time said vessel "Cleo" had been launched and was lying in Bellingham Bay, in the waters of Puget Sound, and was made fast to the dock of defendant company at South Bellingham,

Washington; that said ship was then in navigable waters of the United States of America and the Industrial Insurance or Workman's [3] Act of this State has no authority or jurisdiction to award, or allow plaintiff any compensation or relief because of his injuries aforesaid; that plaintiff applied to said authorities for relief, which they refused on the ground that such cases did not come within their jurisdiction and that they had no authority to allow him compensation.

VII.

That the defendant was negligent in oiling the floor of the main deck of said vessel, and in not making said steps fast to the bridge or the main deck thereof, so that the same could not have slipped, and that because of said negligent acts and omissions on the part of said defendant the plaintiff was severely and permanently injured and was confined to his bed for a period of six and one-half weeks, and thereafter compelled to remain in bed most of the time for a period of two weeks longer. That he suffered intensely and at all times since has suffered from a severe shock to his nervous system, occasioned thereby, and from internal injuries the extent of which cannot be determined, and from constant soreness in the lumbar region of the back.

VIII.

That at the time of said injuries the plaintiff was a strong, healthy and able-bodied man of the age of fifty-three years and earning one hundred

forty-four (\$144.00) dollars per month, and that because of said injuries and severe shock to his nervous system the plaintiff is suffering from traumatic neurasthenia and is a physical wreck, unable to enjoy normal sleep, and is unable to pursue any employment, mental or physical, to earn a livelihood, which condition will likely be permanent. [4]

IX.

That because of said injuries plaintiff has been damaged to the full sum of Eighteen Thousand Dollars (\$18,000.00).

WHEREFORE plaintiff prays judgment against the defendant in the full sum of Eighteen Thousand Dollars (\$18,000.00), together with his necessary costs and disbursements herein expended.

EMIL HOFF,

Plaintiff.

State of Washington,
County of Whatcom,—ss.

Emil Hoff, being first duly sworn, on oath deposes and says: That he is the plaintiff named in the within entitled action, and has read the within and foregoing complaint and believes the same to be true.

EMIL HOFF.

Subscribed and sworn to before me this 28th day of November, 1919.

LESTER WHITMORE,

Notary Public in and for the State of Washington,
Residing at Bellingham, therein.

Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 13, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [5]

United States District Court, Western District of
Washington, Northern Division.

No. 4999.

EMIL HOFF,

Plaintiff,

vs.

PACIFIC AMERICAN FISHERIES,

Defendant.

Demurrer.

Comes now the defendant—demurs to the complaint of the plaintiff on the following grounds:

I.

That the Court has no jurisdiction of the subject matter of the cause of action attempted to be pleaded in the said complaint, or the parties thereto.

II.

Said complaint does not state facts sufficient to constitute a cause of action and affirmatively shows that the plaintiff has no cause of action or right to recover.

KERR & McCORD,
Attorneys for Defendant.

United States of America,
Western District of Washington,—ss.

W. Z. Kerr, being first duly sworn, on oath deposes and says that he is one of the attorneys for the defendant, has read the foregoing demurrer, knows the contents thereof, believes the same to be meritorious and well founded in law.

W. Z. KERR.

Subscribed and sworn to before me this third day of April, 1920.

[Seal]

S. H. KERR,

Notary Public in and for the State of Washington,
Residing at Seattle.

Rec'd copy, April 5, 1920.

LESTER WHITMORE,

Atty. for Pltf.

[Indorsed]: Demurrer. Filed in the United States District Court, Western District of Washington, Northern Division. June 21, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [6]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 4999.

EMIL HOOF,

Plaintiff,

vs.

PACIFIC AMERICAN FISHERIES,

Defendant.

**Order Sustaining Demurrer and Judgment of
Dismissal.**

This cause came on for hearing on demurrer of the defendant to the plaintiff's complaint and was argued by counsel.

The Court having considered the matter now orders that the said demurrer be, and it is hereby, sustained, to which ruling the plaintiff excepts and the exception is allowed.

And it appearing to the Court that the Court has no jurisdiction of the cause of action pleaded in said complaint, it is hereby ordered that this action be and it is hereby dismissed, to which ruling the plaintiff excepts and the exception is allowed.

Done in open court this 7th day of July, 1920.

EDWARD E. CUSHMAN,
United States District Judge.

O. K. as to form.

THOS. P. WATERS,
PERINGER & THOMAS,
Attys. for Pltf.

[Indorsed]: Order Sustaining Demurrer and Judgment of Dismissal. Filed in the United States District Court, Western District of Washington, Northern Division. July 7, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [7]

In the District Court of the United States, for the
Western District of Washington, Northern
Division.

No. 4999.

EMIL HOOF,

Plaintiff,

vs.

PACIFIC AMERICAN FISHERIES,

Defendant.

Petition for Writ of Error.

Now comes Emil Hoof, plaintiff, by his attorneys, Thos. R. Waters and Peringer & Thomas, and respectfully shows:

That on the 7th day of July, 1920, the Court sustained a demurrer filed herein to the plaintiff's complaint, to which ruling of the Court the defendant then and there excepted and the exception was allowed; and on said day it was ordered and adjudged by the Court that this Court was without jurisdiction of the cause of action pleaded in the plaintiff's complaint and the action was dismissed, to which ruling and judgment of the Court the plaintiff then and there excepted and the exception was allowed.

Your petitioner, feeling himself aggrieved by the said order and judgment entered therein as aforesaid, herewith petitions the Court for an order allowing him to prosecute a writ of error to the Circuit Court of Appeals of the United States, for

the Ninth Circuit, under the laws of the United States in such cases made and provided.

WHEREFORE, premises considered, your petitioner prays that a writ of error do issue; that an appeal in his behalf to the United States Circuit Court of Appeals aforesaid, sitting at San Francisco in said Circuit, for the correction of the errors complained of, and herewith assigned (assignments or error being presented herewith), be allowed, and [8] that an order be made that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals; that an order be made fixing the amount of security to be given by the plaintiff in error, conditioned as the law directs, and to the effect that the said Emil Hoof shall prosecute the said appeal to effect and answer all costs if he fails to make his plea good.

THOS. R. WATERS and
PERINGER & THOMAS,

Attorneys for Petitioner in Error.

Writ of error allowed upon giving bond as required by law for the sum of \$500.00.

Dated Oct. 9, 1920.

EDWARD E. CUSHMAN,
Judge.

Order filed in the United States District Court, Western District of Washington, Northern Division, Oct. 9, 1920. F. M. Harshberger, Clerk.
By S. E. Leitch, Deputy.

[Indorsed]: Petition for Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 4, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [9]

In the District Court of the United States, for the
Western District of Washington, Northern
Division.

No. 4999.

EMIL HOOF,

Plaintiff,

vs.

PACIFIC AMERICAN FISHERIES,

Defendant.

Assignment of Errors.

Now comes Emil Hoof, the plaintiff in the above numbered and entitled cause, and in connection with his petition for writ of error in this cause files the following assignment of errors, upon which he will rely upon his prosecution of the appeal in the above-entitled cause from the judgment made by this Honorable Court on the 7th day of July, 1920:

I.

That the United States District Court for the Western District of Washington, Northern Division, erred in sustaining the demurrer interposed by the above-named defendant to the original complaint filed in the cause.

II.

That the United States District Court for the Western District of Washington, Northern Division, erred in holding that it did not have jurisdiction of this cause or the parties, and in entering an order and judgment dismissing the plaintiff's complaint.

WHEREFORE, the appellant prays that the said order and judgment be reversed; that the United States District Court for the Western District of Washington, Northern Division, be ordered to enter an order reversing its said decision in said cause.

THOS. R. WATERS and
PERINGER & THOMAS,
Attorneys for Plaintiff in Error. [10]

[Indorsed]: Assignment of Errors. Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 4, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [11]

In the District Court of the United States, for the
Western District of Washington, Northern
Division.

No. 4999.

EMIL HOOF,

Plaintiff,

vs.

PACIFIC AMERICAN FISHERIES,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Emil Hoof, as principal, and New Amsterdam Casualty Co. of New York, as surety, are held and firmly bound unto Pacific American Fisheries in the sum of five hundred dollars (\$500.00), lawful money of the United States, to be paid to it and to its respective successors or assigns, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, our heirs, executors, administrators, successors or assigns, by these presents.

Sealed with our seals and dated this 29 day of September, 1920.

WHEREAS, the above-named Emil Hoof has prosecuted a writ of error to the Circuit Court of Appeals of the United States, for the Ninth Circuit, to reverse the judgment of the District Court of the United States, for the Western District of Washington, Northern Division, in the above-entitled cause.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Emil Hoof shall prosecute his said appeal to effect and answer all costs, if he fails to make good his plea, then this obligation shall be void; otherwise, to re-

main in full force and effect.

EMIL HOOF,
Principal.

NEW AMSTERDAM CASUALTY CO. OF
NEW YORK,

Surety.

[Seal] By LESTER WHITMORE,
Its Attorney in Fact.

Approved Oct. 9, 1920.

EDWARD E. CUSHMAN,
Judge. [12]

[Indorsed]: Bond. Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 9, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [13]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 4999.

EMIL HOOF,

Plaintiff,

vs.

PACIFIC AMERICAN FISHERIES,

Defendant.

Praeceptum for Transcript of Record.

To the Clerk of the United States District Court,
for the Western District of Washington,
Northern Division:

In making up the record in the above-entitled

cause for the United States Circuit Court of Appeals, we desire to have included in the transcript the following:

1. The complaint or petition.
2. The demurrer filed by the defendant.
3. The order of the Court sustaining the demurrer, together with the order and judgment of the Court dismissing the cause for want of jurisdiction, and the exception taken and allowed at said time.
4. Petition for writ of error.
5. Assignment of errors.
6. Bond and approval.
7. Allowance of writ of error.
8. The writ of error.
9. Citation in error.
10. Acceptance of service of citation on back of said citation in error.
11. Clerk's certificate.
12. Praecipe for record.

THOS. R. WATERS and
PERINGER & THOMAS,
Attorneys for Plaintiff.

We waive the provision of the act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this Court.

PERINGER & THOMAS,
Attorneys for Plaintiff. [14]

[Indorsed]: Praeceptum. Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 15, 1920. F. M. Harshberger, Clerk. S. E. Leitch, Deputy. [15]

United States District Court, Western District of
Washington, Northern Division.

No. 4999.

EMIL HOOF,

Plaintiff,

vs.

PACIFIC AMERICAN FISHERIES,

Defendant.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court, for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 15, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said Court, and that the same constitute the record on return to said writ of error herein from the judg-

ment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [16]

Clerk's fee (Sec. 828, R. S. U. S.) for making record, certificate or return, 22 folios at 15c. \$3.30
Certificate of Clerk to transcript of record—

4 folios at 15c.60
Seal to said certificate.20

I hereby certify that the above cost for preparing and certifying record, amounting to \$4.10, has been paid to me by attorneys for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and original citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 21st day of October, 1920.

[Seal]

F. M. HARSHBERGER,
Clerk U. S. District Court. [17]

In the United States Circuit Court of Appeals,
for the Ninth Circuit.

No. —.

EMIL HOOF,

Plaintiff in Error,

vs.

PACIFIC AMERICAN FISHERIES,

Defendant in Error.

Writ of Error.

United States of America,—ss.

The President of the United States to the Honorable Judge of the District Court of the United States, for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment on a demurrer which is in the said District Court before you, between Emil Hoof, plaintiff in error, and Pacific American Fisheries, defendant in error, a manifest error has happened to the damage of Emil Hoof, plaintiff in error, as by the said complaint appears, and we being willing that the error, if any hath been, should be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in the State of California, where

said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States should be done. [18]

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this the 9th day of October, 1920.

[Seal] F. M. HARSHBERGER,
Clerk of the U. S. District Court for the Western
District of Washington.

Allowed this the 9th day of October, 1920.

EDWARD E. CUSHMAN,
United States Judge.

[Indorsed]: Issued in the United States District Court, Western District of Washington, Northern Division. Oct. 9, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [19]

In the District Court of the United States, for the
Western District of Washington, Northern
Division.

No. 4999.

EMIL HOOF,

Plaintiff,

vs.

PACIFIC AMERICAN FISHERIES,

Defendant.

Citation on Writ of Error.

United States of America,—ss.

To the Pacific American Fisheries, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, to be held in the city of San Francisco, State of California, on the 8th day of November, 1920, pursuant to an order allowing a writ of error filed and entered in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, on a final judgment signed, filed and entered on the 7th day of July, 1920, in that certain action, being cause No. 4999, wherein Emil Hoof is plaintiff and you are the defendant and appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected and why speedy justice should not be done in the premises.

WITNESS, the Honorable EDWARD E. CUSHMAN, United States District Judge for the Western District of Washington, Northern Division, this 9th day of October, 1920.

[Seal]

EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington, Northern Division.

We acknowledge receipt of a copy of the within document this 13th day of October, 1920.

KERR & McCORD,
Attorneys for Defendant.

[Indorsed]: Issued in the United States District Court, Western District of Washington, Northern Division. Oct. 9, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [20]

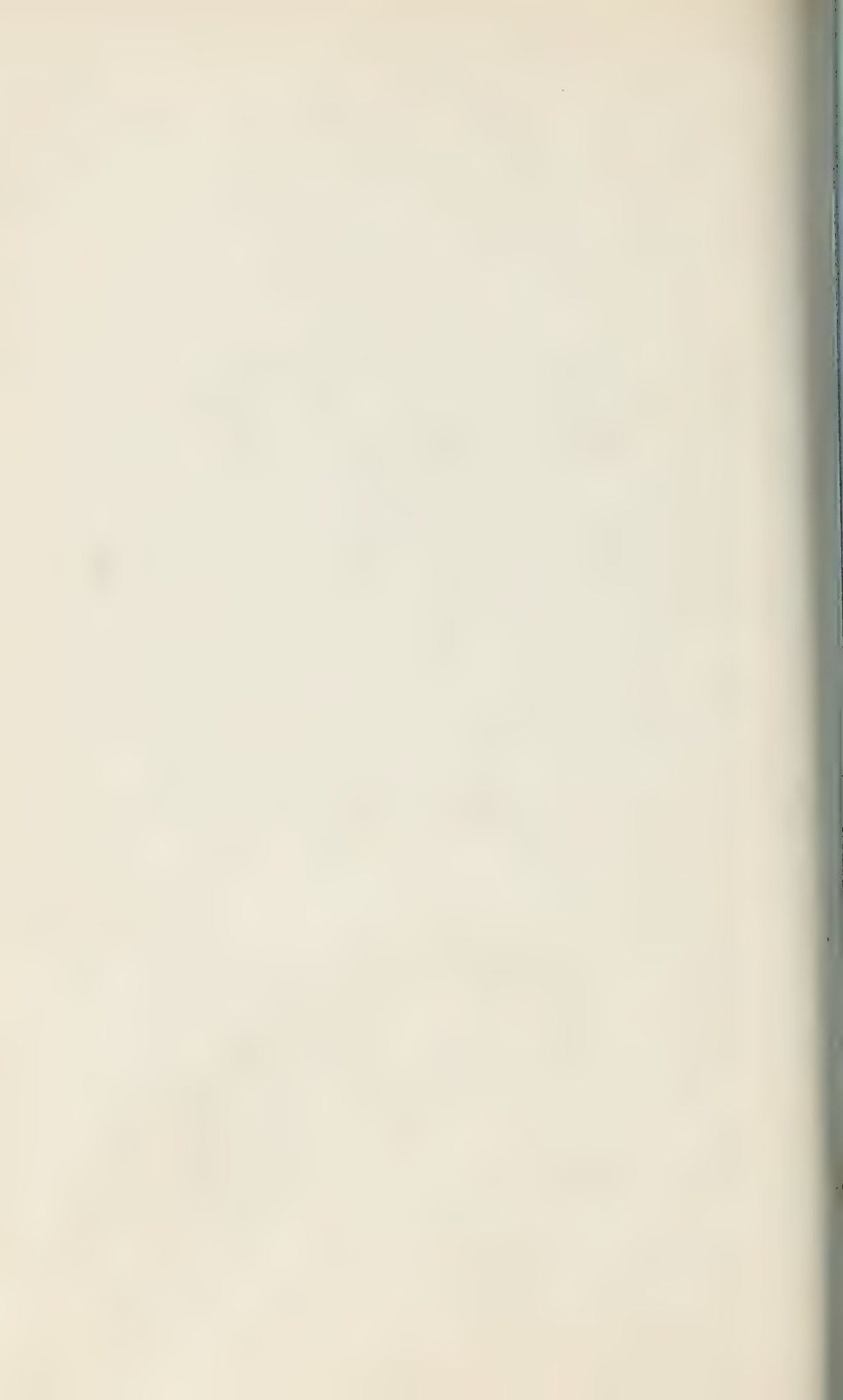
[Endorsed]: No. 3590. United States Circuit Court of Appeals for the Ninth Circuit. Emil Hoof, Plaintiff in Error, vs. Pacific American Fisheries, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed October 23, 1920.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.



In the United States Circuit Court of Appeals for the Ninth Circuit

EMIL HOOF,

Plaintiff in Error,

vs.

PACIFIC AMERICAN FISHERIES,

Defendant in Error.

No. 3590

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHING-
TON, NORTHERN DIVISION

HON. EDWARD E. CUSHMAN, *Judge*

BRIEF OF PLAINTIFF IN ERROR

THOS. R. WATERS,

PERINGER & THOMAS,

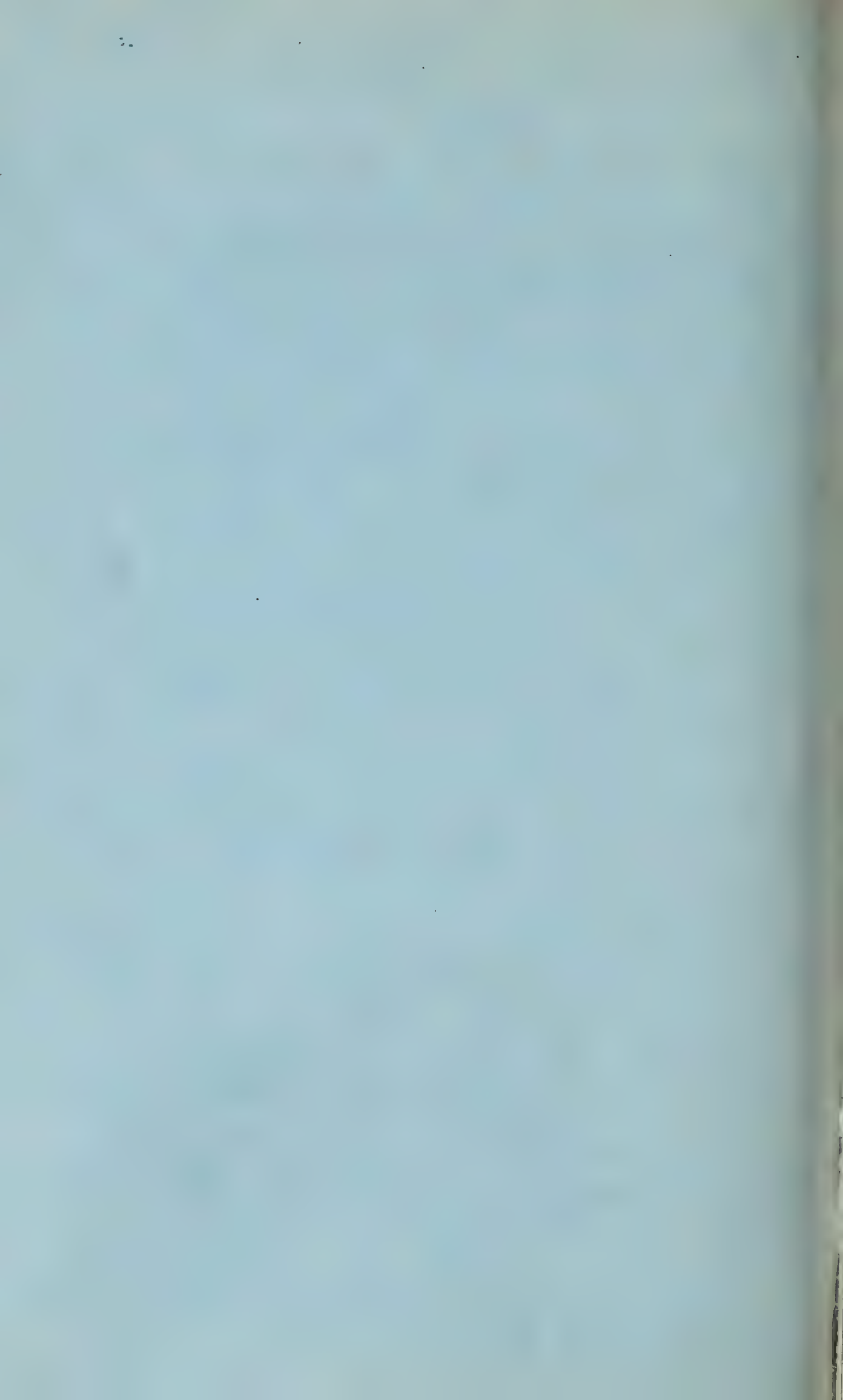
Attorneys for Plaintiff in Error.

Print of Anstett Printing Co., Bellingham

FILED

JAN 10 1921

F. D. MONCKTON



In the United States Circuit Court of Appeals for the Ninth Circuit

EMIL HOOF,

Plaintiff in Error,

vs.

PACIFIC AMERICAN FISHERIES,

Defendant in Error.

No. 3590

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHING-
TON, NORTHERN DIVISION

HON. EDWARD E. CUSHMAN, *Judge*

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF CASE

This action was commenced in the Superior Court of the State of Washington, for Whatcom County, and is an action for damages for personal injuries upon a complaint filed in said Court, which complaint, briefly stated, was in substance as follows:

That the plaintiff on the 16th day of April, 1919, and for a long time prior thereto, had been employed by the defendant as a watchman on a certain vessel known and designated as the "Cleo"; that the said vessel was being built by the defendant for the United States Government; that it had been launched in Bellingham Bay, navigable waters of the United States, but not yet put into commission; that on the said 16th day of April, 1919, while in the performance of his duties as watchman, the plaintiff, on account of the negligence of the defendant in failing to guard or secure certain steps, while said steps were resting on the recently oiled deck, negligently left by the defendant in a slippery condition, fell from the bridge deck to the main deck of the said vessel and was permanently injured, for which he claimed damages in the sum of \$18,000.00. It was also alleged that because the plaintiff was employed on said vessel after it had been launched, the plaintiff could not recover under the Workmen's Compensation Law of the State of Washington, and that he therefore had only the right to bring an action at common law to recover for his injuries. (Tr. 1-5, inc.)

The defendant is not a Washington corporation,

and on account of the diversity of citizenship made application to have the cause transferred to the Federal Court, and the same was transferred to the Federal Court on January 13, 1920, on said application. (Tr. 6.)

On June 21, 1920, a demurrer to said complaint was filed by the defendant in the United States District Court, on the grounds (1) that the Court had no jurisdiction of the subject matter of the causes of action attempted to be pleaded in plaintiff's complaint or the parties thereto; (2) that said complaint did not state facts sufficient to constitute a cause of action and affirmatively showed that the plaintiff had no cause of action or right to recover. Said demurrer came on for hearing on the 7th day of July, 1920, and the Court, after considering the same, made an order sustaining the said demurrer; to which ruling the plaintiff then and there excepted, and his exception was allowed. And thereupon the Court made an order and judgment of dismissal on the ground that the Court had no jurisdiction of the cause of action pleaded in said complaint; to which ruling and judgment of the Court the plaintiff then and there excepted, and his exception was noted and allowed. (Tr. 8.)

This writ of error is sued out for the purpose of having said order sustaining said demurrer, and the said judgment of dismissal, reversed.

ARGUMENT

The learned trial judge erred in holding that the Court did not have jurisdiction of the cause, for the reasons that:

1. Under the holding of the Supreme Court of the State of Washington the Workmen's Compensation Law of the state did not apply and the plaintiff had a right to bring a common law action, and the action was properly brought in the State Courts; that said action, being properly brought, the defendant by transferring the same to the Federal Courts on the ground of diversity of citizenship, could not then proceed and oust that Court out of jurisdiction, whether the action is maritime or non-maritime.

(2) That the action is one for tort, and as it is shown that it occurred on navigable waters of the United States, the action is maritime, because location is the criterion of admiralty jurisdiction in cases of tort.

(3) The injury, occurring on account of the

defective condition of a vessel, comes within the limits of the doctrine of full compensation for laborers on shipboard on account of unseaworthiness of a vessel, which doctrine has been created and is still especially favored by the American Admiralty Courts.

We will discuss these in the order above given.

I.

REGARDLESS OF THE NATURE OF THIS ACTION, THE TRIAL COURT HAD JURISDICTION, BECAUSE THE PLAINTIFF DID NOT HAVE ANY REMEDY UNDER THE WASHINGTON WORKINGMEN'S COMPENSATION ACT.

It seems clear that if the State of Washington did not have a Workmen's Compensation Act, the Federal Court would have jurisdiction even if the plaintiff's complaint did not bring the cause within maritime jurisdiction. Under the decisions of the Supreme Court of Washington, evidently location is the criterion by which the extent of the Workmen's Compensation Act is determined, and workmen on navigable waters do not come within the Act.

Jarvis vs. Gaggett, 87 Wash., 253.

Shaugnessy vs. Northland Steamship Co.,
94 Wash., 325.

*Puget Sound Bridge & Dredging Co. vs.
Industrial Insurance Commission*, 105 Wash.,
272.

The case of *Puget Sound Bridge & Dredging Company vs. Industrial Insurance Commission*, supra, was an action brought by the dredging company to enjoin the collection of premiums under the Workmen's Compensation Act. The Industrial Insurance Commission contended that all of the plaintiff's employees engaged in dredging in navigable waters within the State of Washington were subject to the Workmen's Compensation Act, and that premiums should be paid on account of the work of all such employees. The dredging company employed three classes of workmen—those who worked only upon the dredge, those who worked wholly upon the land, and those who worked partly upon the dredge and partly upon the land. The Court held that the dredging company should pay premiums on all the employees who worked exclusively on the land; that it should not pay premiums upon employees working upon the dredge exclusively; that

it should pay premiums on the time of employees who worked alternately on the land and on the navigable water, in proportion to the time that such employees were working on the land.

In the case of *Shaugnessy vs. Northland Steamship Co.*, supra, the Court held:

“Under Rem. Code, Sec. 6604-27 of the workmen’s compensation act, providing that, if any employer shall be adjudicated to be outside of the lawful scope of the act, the act shall not apply to his workmen, an employee injured while engaged on a ship in maritime service is not relegated to his remedies in admiralty, by reason of Sec. 6604-1, which abolishes all civil actions for personal injuries in extra hazardous work; since, being outside the lawful scope of the act, all his rights and remedies remain unimpaired as if the act had never become a law of the state.”

In the body of the opinion the Court said:

“We have not overlooked the decision of Judge Cushman of our Federal district court in *Stoll vs. Pacific Coast S. S. Co.*, 205 Fed. 169, wherein it was held that an action upon the law side of the Federal district court, which could have been maintained in admiralty, for injuries received as the result of the steamship company’s negligence could not be maintained; the decision being rested upon the language of section 1 of the act (*Id.*, Sec. 6604-1) above quoted,

and apparently regarded by the court as absolutely abolishing the employee's right to maintain such an action in the courts and substituting therefor his right to compensation from the accident fund. The fact that the plaintiff had a right to seek his remedy in admiralty seems not have been noticed in the case. We think, therefore, that the decision would not be a controlling authority here even if the question were a Federal one, as it manifestly is not, since it has to do, in its last analysis, only with the right to maintain a common law action in the state courts."

It will be noticed that in the plaintiff's complaint it was alleged that the claim of the plaintiff was first presented to the Industrial Insurance Commission under the Workmen's Compensation Act and that he was refused relief because he was employed upon navigable waters at the time of his injury. The holding of the Commission is in line with the Supreme Court opinions of the State of Washington, and the facts are that after ships were launched the corporations engaged in building ships in the waters of Puget Sound did not pay premiums on workmen employed on such vessels. This being true, the plaintiff did not have any remedy under the Workmen's Compensation Act, and he had the undoubted right to bring a common law action in the

State Courts. If this Court holds that the Federal Court is without jurisdiction because the action is non-maritime in its nature, then the plaintiff is without any remedy whatsoever.

The fact that the Washington Courts have from time to time decided admiralty cases by no means militates against this conclusion, but actually strengthens it. It will be seen that the key to all of the later Washington cases of this character is *Larson vs. Alaska Steamship Co.*, 96 Wash., 665, which will be found to rest upon the doctrine laid down in *The Hamilton*, 207 U. S., 398 (52 L. Ed. 264), which in construing the clause in the judicial code, "of all civil causes in admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it," confers upon the State Courts concurrent jurisdiction with the Federal Courts as to torts committed at sea. The State Court, therefore, in entertaining these admiralty cases, claims no more than concurrent jurisdiction and is not administering any specific state-created remedy or code of laws, but is acting rather under Federal and general maritime law than Washington laws, as may be observed by the continual discussion of maritime law and the

citation of Federal cases occurring therein. It will be found that in any of these cases where the question of jurisdiction has been raised or considered the Court bases its right either directly upon *The Hamilton*, supra, or indirectly through it upon *Larson vs. Alaska Steamship Co.*

II. ,

LOCATION IS THE CRITERION AS TO MARITIME JURISDICTION IN ALL CASES OF TORT.

In the argument before the trial Court two classes of cases were cited in support of the demurrer. One class of cases cited, however, does not appear to have any bearing on the case, the same being "*The American*," 56 Fed. 1021, "*The Serius*," 65 Fed. 226, "*The Furber*," 157 Fed., 124, "*The Fortuna*," 206 Fed., 573, "*The Sinaola*," 209 Fed., 287. While each of them deals with a watchman on ship-board, they are in every case lien actions to recover wages, and therefore cases of contract and not of tort. There is no dispute about the doctrine that the nature of the subject matter determines the ex-

istence of admiralty jurisdiction in cases of contract.

The second contention made was that locality is no more the test of jurisdiction in cases of tort than in contract. This contention is contrary to the overwhelming and almost unanimous weight of authority.

Abbott's Federal Practice (second edition), Vol. 1, p. 291.

A. & E. Enc., vol. 1, p. 656.

Kent's Commentaries (13th edition), 426 (Note B), 429, 430 (Note Y).

1 *Cyc.*, 842.

1 *R. C. L.* (Admiralty), paragraphs 13, 14, 19, 22. (Note 16 to paragraph 13 and Note 19 to paragraph 19, resting on 22 U. S. 191 (56 L. Ed. 159), will be found on reading their authority to show only that injury by a boat to a permanent structure on land is not within the definition of a maritime tort, and not as the language indicates, that the subject matter rather than the locality governs.)

Nor is this rule limited in its application to injuries to crew or passengers, but applies to all persons on board the vessel, as appears from the case of *Leather vs. Blessing*, 151 Otto, 626 (26 L. Ed. 1192), where a consignee of a load of cotton, while

on board to learn whether the cotton had arrived on that vessel, was injured by a fall of part of the cargo, and his recovery of damages was allowed based on the ground that he was lawfully on board.

The 66th Fed., 1013, holds that the improper seizure of a ship under state liquor law was a tort cognizable in the admiralty court. The 4th Fed. at 231 holds that admiralty may give damages to parents for the kidnapping of a minor by a shipmaster and compelling him not continue to work on shipboard during the oyster season, because such act was a maritime tort.

There are, in addition, numerous cases of injuries to stevedores and others whose relations to the ship were similar. These cases will not be quoted, inasmuch as the *Jensen* case and the *Peters* case hereafter discussed in full may be considered to have weakened them by indicting that stevedoring is in itself a maritime occupation. However, an early stevedore case (20 Fed., 135) at a time when the doctrine of the maritime nature of stevedoring had not been formulated, applied to all landsmen the rule above mentioned, viz., that any person lawfully on board is entitled to damages in admiralty for injuries there received.

A somewhat different case is that of *Anderson vs "The E. B. Wood,"* 38 Fed., 44, where one ship was occupying the key berth and a second moored alongside. A sailor of the second ship, while intoxicated, was passing over the first ship and fell into an unguarded hatchway. The Court, while holding that the intoxication of the sailor was sufficient contributory negligence to bar recovery, determined that inasmuch as he was lawfully on board the vessel in the key berth, his injury, if culpable, was a maritime tort, and as such his rights were triable in an admiralty court.

A number of other unusual tort cases where admiralty had jurisdiction may be found in *Curtis' Admiralty Digest*, 34 and 35, and a general statement of the rules of admiralty torts on page 495 of the same work.

Somewhat more in point are the two famous "ladder cases," *The H. S. Pickands*, 42 Fed., 239, and *The Strabo*, 90 Fed., 110. In the former the plaintiff was climbing down a ladder connecting the ship with the dock, when the ladder slipped and he was thrown upon the dock and injured. Damages were not allowed in the Admiralty Court, because

it was held that the injury occurred when he struck the dock, and therefore, occurring on land, was not a maritime tort cognizable in that Court; and in passing it may be noted that his occupation, that of repairing a ship which was already in commission, was by all authorities unquestionably maritime.

The second case overrules the former on the ground that the injury occurred not at the time of impact with the dock, but when the ladder slipped, therefore, again holding locality to be the test, and not the nature of the employment engaged in.

In the case at bar the plaintiff was injured on a boat on tide water, so there can be no question as to the maritime locality, since the doctrine denying jurisdiction as to acts occurring within the body of the county has been obsolete in the United States since 1846, when it was definitely destroyed by the decision of *Warring vs. Clarke*, 5 Howard, 441. It is apparent, therefore, that to uphold the decision below, this Court must necessarily determine that the old and unquestioned rule that locality is the test of admiralty jurisdiction in tort cases, has been overthrown by the cases cited by the defendant in the lower Court, as follows: *Campbell vs. Hackfield*, 125

Fed., 696, *The Atlantic Transport Co. vs. Imbrovek*, 234 U. S., 63 (58 L. Ed. 1208), *Southern Pacific Co. vs. Jensen*, 244 U. S. 205 (61 L. Ed. 1086), *Peters vs. Veasey*, 40 U. S., 65, which cases will now be considered in detail.

The first of these cases, *Campbell vs. Hackfield*, which is a decision from this Court, is squarely in point and the strongest decision on record in favor of the abolition of locality as a test of jurisdiction in tort cases. That it was contrary to practically all texts and decisions at the time it was decided is admitted by the Court in its quotation from 16 Harvard Law Review, p. 210, which was written after this case had been decided in the District Court and before its assignment in this Court, which states that it

“infringes a rule which originated in the very nature of admiralty jurisdiction and which has been satisfactory in its practical operations. This test has been all but universally regarded as the sole one. * * * Not only would the adoption of its doctrine unsettle a rule which has long assumed to be the law, but it would make the question of jurisdiction over torts subject to the difficulty which has so often perplexed the cases of contract, viz., the necessity of deciding in each case what is a maritime relation. The decision in the principal case seems there-

fore unfortunate as increasing complication and uncertainty in the law without apparently securing any practical gain to compensate for these advantages.”

The use of the authorities on which it is supported, like those cited in the first point of the plaintiff's argument herein, show the Court to have failed to distinguish between the rule in cases of contract and in cases of tort. The first quotation (from Judge Story) says, in so many words, that jurisdiction in tort actions is always bounded by locality. The quotation from 11 Wallace 1 applies only to contracts, and the first part of that quotation itself automatically rules out any support by the case of *The Queen vs. the Judge of the City of London Court*, since it determines that English restrictions do not apply in American admiralty jurisdiction. This leaves the case to rest exclusively upon the quotation from Benedict's Admiralty, where he states:

“Cases of torts on the high seas *supra altum mare* have always been held, even in England, to be within the jurisdiction of admiralty, and the jurisdiction in such cases has usually been held to depend upon locality, embracing only civil torts and injuries done on the sea or on waters of the sea where the tide ebbs and flows. It depends upon the place where the cause of action

arises, and the place must be waters which are subject to admiralty jurisdiction,”

and merely adds as *dicta* the sentence:

“It may, however, be doubted whether the civil jurisdiction in such cases of torts does not depend upon the relation of parties to a ship or vessel, embracing only those tortuous violations of maritime rights and duties which occur in vessels to which admiralty jurisdiction in cases of contract applies * * *.”

In the second case, *The Atlantic Transport Co. vs. Imbrovek*, the Court, after summarizing a large number of cases, quoted with approval from A Wallace 20 (18 L. Ed. 125):

“Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance,”

supporting the same by some twenty citations; and continues:

“It is also apparent that Congress in providing for the punishment of crimes committed upon navigable waters has regarded the locality of the offense as a basis for the exercise of its authority,”

followed again by numerous citations; and again continues:

“But the petitioners urge that the general statements which we have cited with respect to the exclusiveness of the test of locality in cases of tort are not controlling, and that in every adjudicated case in this country in which the jurisdiction of admiralty in respect to torts has been sustained, the tort, apart from the mere place of its occurrence, has been of a maritime character. It is asked whether admiralty would entertain a suit for libel or slander circulated on shipboard by one passenger against another. (See Benedict’s Admiralty, 4th ed., Art. 231.) The appropriate basis, it is said, of all admiralty jurisdiction, whether in contract or in tort, is the maritime nature of the transaction or event. It is suggested that the wider authority exercised in very early times in England may be due to its antedating the recognition by the common law courts of transitory causes of action, and thus arose by virtue of necessity.

“We do not find it necessary to enter upon this broad inquiry. As this Court has observed, the precise scope of admiralty jurisdiction is not a matter of obvious principle of very accurate history. The *Blackheath U. S. vs. Evans*, 195 U. S. 361-5-7 (49 L. Ed. 236-8), 25 Supm. Ct. Rep., 46. We are not now concerned with the extreme cases which are hypothetically presented. Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case the wrong which was the subject of the suit was, we think, of a maritime nature; hence the District Court, from any point of view, had jurisdiction.”

It is evident, from the similarity of the language used, that the Court in stating the contentions of the petitioners, in next to the last paragraph quoted, had in mind the argument of this Court in the *Hackfield* decision, which had been cited by the defendant's counsel in his brief therein, and it is also evident from expressions of the Court, and citations given in the first part of the quotation also show, that the Court unquestionably disapproved of the doctrine laid down in that decision, and insofar as it was able to do so without making decision upon points not required in the case, overruled it.

The remaining two cases are scarcely in point. *The Southern Pacific Co. vs. Jensen* deals with the extent to which the New York Workmen's Compensation Act may govern injuries aboard ship, the particular instance being the death of a stevedore while engaged in unloading cargo. It is true that the Court there stated, "The work of a stevedore is maritime in its nature and his injuries maritime," citing the *Imbrovek* case, *supra*, but it does not even mention *Campbell vs. Hackfield* or the question of locality in cases of tort, apparently holding, as in the *Imbrovek* case, that both locality and subject matter are favorable for jurisdiction.

The first dissenting opinion deals with the extent to which admiralty is subject to change by concurrent jurisdiction of common and statutory law, and assumes the maritime nature of deceased's employment, or, rather, minimizes the distinction between maritime and non-maritime torts, without stating whether the assumption is based upon the locality of the injury or the nature of the services. The second dissenting opinion deals principally with the difficult question of the extent to which Federal and State Courts have concurrent jurisdiction in admiralty cases under the clause, "saving to suitors the common law rights where the common law is competent to give them"; and while apparently assuming the maritime nature of the employment, the statement appearing on p. 252 of 244 U. S. (61 L. Ed. 1114), "The civil jurisdiction in admiralty cases *ex contractu* is dependent upon the subject matter. In cases *ex delicto* it is dependent upon locality," which sentiment is elsewhere repeated in different words, would make it appear that these judges must have based their belief as to the maritime nature of the injury upon the fact that Jensen was working upon the ship, rather than his employment there as a stevedore.

The case of *Peters vs. Veasey* is practically parallel with the last case and arises under the Workmen's Compensation Law of Louisiana, and the only statement which can by any stretch of imagination be considered as bearing upon this question is as follows:

“The work in which the defendant in error was engaged is maritime in its nature, his employment was a maritime contract, and the injuries he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were clearly in maritime jurisdiction,”

which is used in denying the application of the State Workmen's Compensation Law to the case.

The Supreme Court has, therefore, practically overruled the case of *Campbell vs. Hackfield*, and the most favorable view for the defendant that can be taken of its opinions merely states that a stevedore is engaged in a maritime occupation, and there is nothing directly or indirectly to show that an injury to one engaged in a non-maritime occupation occurring within the locality under admiralty jurisdiction will not be considered as a maritime tort in accordance with the long established and almost unanimously approved rule of both the English and American Courts.

A recent re-affirmance of the rule that locality governs may be found on p. 125 of 249 U. S., being 512 of 63 L. Ed. That the above interpretation of the Supreme Court's attitude is recognized as correct by this Court is evidenced by its affirmance of the decision of Judge Neterer in the *Steamship Hokkai Maru and Mitsui & Company, Ltd., a corporation, vs. W. C. Hubbard*, No. 3244. In that case a watchman recovered damages for injury resulting from being thrown off a ladder while boarding a steamer. The Court affirmed the decision and upheld the admiralty jurisdiction on the analogy between this case and that of *The Strabo*, supra, and *The Plymouth*, 3 Wallace 20, apparently conceding the point as too well settled for dispute, and confining the most of its discussion to the questions of negligence and the fellow servant rule.

III.

THE PLAINTIFF SHOULD RECOVER FULL COMPENSATION UNDER ADMIRALTY LAW.

This injury, according to the facts admitted for the purpose of the demurrer, was due to the im-

proper fastening and guarding of a stairway on the ship and to the fact that the stairway, when not properly fastened, was allowed to rest upon a recently oiled and slippery deck. It therefore comes within the rule first distinctly stated in *The Osceola*, 198 U. S., 599 (47 L. Ed., 760), where the Court, after an exhaustive review of a large number of earlier cases, lays down a series of principles governing damages in American admiralty law, of which the second is as follows:

“That the vessel and her owner are both by English and American law liable to indemnity for injuries received by seamen in consequence of the unseaworthiness of a ship or the failure to supply and keep in order the proper appliances appertinent to such ship.”

This principle was acted on in numerous decisions in lower Courts, particularly *The Argo*, 210 Fed., 578, which is an almost parallel case with the one at issue, being for the injury of a seaman due to the improper fastening of an iron guard in the engine room. See also 218 Fed., 81, and 179 Fed., 293, where the Court says:

“A seaman injured in the service of a vessel has a right to recover against the vessel and her owners for his wages and the expense of his

maintenance and cure to the end of the voyage, or as long as he has a right to wages, whether he is or they are guilty of negligence, or not, and this is the extent of his right to recover. There is an exception, apparently a departure from American law, but established by so many decisions that the Supreme Court has declined to disturb it, viz., that if the seaman's injury is due to the personal negligence or default of the ship's owners, as, for instance, to the unseaworthiness of the vessel or her tackle, or failure to supply proper medical treatment and attendance, he may recover full indemnity,"

citing *The Iroquois*, 194 U. S., 240 (48 L. Ed., 555), *The Osceola*, supra, and *The Troop*, 128 Fed., 856.

The *Osceola* doctrine has been re-affirmed, word for word, by the Supreme Court in the case of *Chaelentis vs. Luckenbach Steamship Co.*, 247 U. S., 372 (62 L. Ed. 171).

In a recent case from the State of Washington, Wash. Dec. vol. 12, p. 382, at p. 390, the Court, after referring to Carver on Carriage of Goods by Sea, Sec. 18, said:

"This was said having in view the general question of liability of carriers to the shippers; but we apprehend that the law calls for an equal degree of safety as to 'design, structure, condition and equipment,' looking to the safety of seamen. It seems to us that the negligent furnish-

ing of the gasoline in the place of kerosene, under such circumstances as was done in this case, was fraught with even greater perils than the furnishing of the insecure chair pedestal, as was done in the *Larson* case. The former menaced the safety and even the lives of the entire crew, and the existence of the boat itself; while the latter was a menace only to the individual that might seek to use it in some such manner as *Larson* did. The following authorities, we think, lend support to our conclusion that the maritime law does not stand in the way of respondent's recovery in this case. *The Titana*, 19 Fed. 101; *The Noddleburn*, 28 Fed. 855; *The Troop*, 128 Fed. 856; *The M. E. Luckenbach*, 174 Fed. 265; *The Argo*, 210 Fed. 872; *The Badger*, 218 Fed. 81."

From a reading of the various cases above cited, it will be observed that a seaworthy ship has come to mean in maritime law practically the equivalent of a "safe place to work" in common law, as it has been happily expressed by the petitioner's brief on p. 1173 of the 62nd L. Ed., in *The Clementis vs. Luckenbach Steamship Co.*, *supra*. The case at bar falls easily within the limits thus set, and the trial court was therefore bound to grant relief not only to the extent of medical attention required and loss of wages, but also to grant full and complete indemnity for subsequent loss of earning ability as well.

IV.

UNDER ANY ONE OF THE THREE POSSIBLE VIEWS THAT THE COURT MAY TAKE OF THIS CASE, THE COURT BELOW HAD JURISDICTION.

In a final analysis this case resolves itself into three alternative propositions:

(1) The Court may, following our second contention, conclude that, locality being the test in tort, this is an admiralty case and as such as governed solely by Federal law and triable only in the Federal Courts, and it needs no citation, although this proposition has really been decided in the *Jensen* case and the case of *Peters vs. Veasey*, supra, to show that if this is the case the State Legislature and the State Courts, even if they so desired, had no power to interfere or to oust the Federal Courts from jurisdiction of the matter. Such being the case, there could be no possible alternative to the bringing and determination of this action in the Federal Courts.

(2) The Court may agree that *The Hamilton* and the Washington cases founded thereon state the law, and that in tort cases the State Courts have con-

current jurisdiction with the Federal Courts. If this is the case, there would be no particular objection to the determination of this in the Federal Court rather than in the State Court, in any event; and it certainly does not lie within the mouth of the defendant, after having chosen his forum over the protest of the plaintiff, to now object to it and have this case dismissed from Court, leaving the plaintiff remediless, and for no fault of his own.

(3) If, however, this Court should take the view that this is a strictly State matter, and not governed or controlled in any way by the Federal laws or the Federal Courts, it is particularly bound to regard the decisions of our own State Courts as to the rights of the parties and the effect of the Workmen's Compensation Law, and therefore must decide that the Workmen's Compensation Law has no bearing on the matter and that the proper and only action for the plaintiff is a common law action for damages; and arriving at this conclusion, it must, under the paramount Federal laws and decisions, agree that any common law action in the State Court may properly be transferred on the theory that this one was, into the Federal Courts on the grounds of diversity of citizenship.

The order sustaining the demurrer and dismissing the action should be reversed.

Respectfully submitted,

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IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

EMIL HOOF,

Plaintiff in Error,

vs.

PACIFIC AMERICAN FISH-
ERIES,

Defendant in Error.

No. 3590

*Upon Writ of Error to the United States District
Court for the Western District of Washington,
Northern Division*

HON. EDWARD E. CUSHMAN, *Judge.*

BRIEF OF DEFENDANT IN ERROR

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BRIEF OF DEFENDANT IN ERROR

STATEMENT OF CASE.

This is an appeal from a judgment, dismissing an action at law for personal injuries, entered after the court had sustained a demurrer to the complaint. The action was originally begun in the Superior Court of Whatcom County, State of Wash-

ington, and removed by the defendant to the United States District Court, the ground of removal being diversity of citizenship.

The complaint alleges that in the month of April, 1919, the defendant was engaged in building a number of vessels for the government. The plaintiff was employed by the defendant as a watchman on one of these hulls, known as the "Cleo," and while so employed was injured by reason, so it is said, of the negligence of the defendant in not properly securing certain steps leading from the bridge deck to the main deck. The complaint affirmatively states that at the time of the accident the hull "Cleo" was not yet completed as a ship, although then afloat in navigable water and moored to the defendant's dock at South Bellingham.

After the case had been removed to the United States District Court, the defendant demurred on the following grounds: (1) That the court has no jurisdiction of the subject matter of the action attempted to be pleaded in the complaint, or the parties thereto. (2) Said complaint does not set forth facts sufficient to constitute a cause of action and affirmatively shows that the plaintiff has no cause of action or right to recover (Transcript of Record, page 6).

This demurrer was sustained and the action dismissed as we have stated.

POINTS AND AUTHORITIES.

I.

The Workmen's Compensation Act of the State of Washington abolishes the jurisdiction of the courts to adjudicate claims arising out of injuries sustained by workmen to the full extent that it is within the power of the state to abolish such remedies, but for want of power the state statute does not extend to a maritime tort for which a remedy is provided in admiralty.

Stertz vs. Industrial Insurance Commission,
91 Wash. 588;

State ex rel. Jarvis vs. Daggett, 87 Wash. 253;

Shaughnessy vs. Northland Steamship Co.,
94 Wash. 325;

Atlantic Transport Co. vs. Imbrovek, 234
U. S. 63; 58 L. Ed. 1028;

S. P. Co. vs. Jensen, 234 U. S. 205; 61 L. Ed.
1086;

Peters vs. Veasy, 251 U. S. 121.

II.

Admiralty has no jurisdiction in a tort action unless the service is maritime—locality not being the sole test of admiralty jurisdiction.

Campbell vs. Hackfeldt, 125 Fed. 696;
Atlantic Transport Co. vs. Imbrovek, supra;
S. P. Co. vs. Jensen, supra.

III.

The services of a watchman in no way connected with the navigation of a vessel are non-maritime.

The America, 56 Fed. 1021;
The Sirius, 66 Fed. 226;
The Furber, 157 Fed. 124;
The Fortuna, 206 Fed. 573;
The Sinaloa, 209 Fed. 287.

IV.

An incompleated hull is not an instrumentality of commerce and navigation, even though afloat in navigable water.

Thames Towboat Co. vs. The Schooner Francis McDonald (U. S. Supreme Court Advance Opinions issued January 1, 1921).

ARGUMENT.

In the last analysis the decision in this case will depend upon the answer which the court shall give to one clear-cut question of law which may be stated thus: Is a workman, employed as a

watchman on an uncompleted hull, afloat in navigable water but moored to the dock of the builder, engaged in the performance of a maritime service?

If such a person is engaged in a maritime service, the decision of the court below is wrong. On the other hand, if such a service is non-maritime, the judgment appealed from should stand affirmed. One or the other of these results follows, because the maritime or non-maritime character of the service determines the application or non-application of the Workmen's Compensation Act to the claim asserted by the plaintiff in error. If the compensation act comprehends the claim asserted the plaintiff in error cannot maintain an action in the courts. If the Workmen's Compensation Act does not comprehend this claim, he may sue at law to recover his damages.

At the very outset we wish to make clear that this demurrer, so far as it challenges the *jurisdiction* of the United States District Court to which the cause was removed by the defendant, was not interposed on any ground that goes to the jurisdiction of that court, because and only because it is a federal court. The objection on the ground of jurisdiction was only intended to suggest that, by reason of the existence and provisions of the Workmen's

Compensation Act of Washington, no court, neither state nor federal, has jurisdiction to render a judgment for damages in a case like this, because by the terms of the Washington compensation statute, the jurisdiction of all courts has been abolished with respect to claims arising out of accidents that fall within the terms of the act. In this aspect of the matter, the objection to jurisdiction is perhaps included in the more general specification that the complaint fails to state facts sufficient to constitute a cause of action cognizable in a court of law.

It is the contention of the defendant in error that the work in which the plaintiff in error was engaged, was a non-maritime service within the scope of the Workmen's Compensation Act and therefore excluded from the jurisdiction of the courts.

In the year 1911, the legislature of the State of Washington passed an act entitled, "An Act Relating to the Compensation of Injured Workmen in Our Industries," etc. (Chap. 74, Laws 1911, page 345). In order to make clear the purpose and scope of that act, it is not necessary now to do more than refer to the case of *Stertz vs. Industrial Insurance Commission*, 91 Wash. 588, in which the Supreme Court of Washington analyzed the scope of the

statute and epitomized its purpose in the following language: "To sum up, our act positively ends the "jurisdiction of the courts,' on 'all phases' of master and servant liability" (p. 595). As construed by the Supreme Court of Washington in the decision just mentioned, the Workmen's Compensation Act undertakes to completely abolish the jurisdiction of all courts to deal with such claims to the full extent that it is within the power of the state to deny jurisdiction to the courts. The Supreme Court of Washington, however, has recognized that there is a field over which the state has no legislative power, and as to this field the compensation act is not operative for want of such power. The exception includes only maritime claims within the admiralty jurisdiction.

In *State ex rel. Jarvis vs. Daggett*, 87 Wash. 253, and *Shaughnessy vs. Northland Steamship Co.*, 94 Wash. 235, the Supreme Court of Washington held that the Workmen's Compensation Act could not, constitutionally, be construed to extend to maritime employments. These decisions of the Supreme Court of Washington are in exact harmony with the decisions of the Supreme Court of the United States on the same subject, namely, *Atlantic Transport Co. vs. Imbroke*, *supra*; *S. P. Co. vs. Jensen*,

supra, and *Peters vs. Veasy, supra*. It therefore is quite clear that the Workmen's Compensation Act completely abolished the jurisdiction of the courts with respect to all claims of workmen, save only those cognizable in admiralty. If then the claim asserted by the plaintiff in error is non-maritime, the court has no jurisdiction over it, while, on the other hand, if the claim is really maritime, the courts have jurisdiction, because it is beyond the power of the state to modify or abolish the admiralty jurisdiction. If the claim, being maritime, is one which could have been asserted in admiralty, it may likewise be asserted in the form of a common law action by reason of that provision of the federal judicial code conferring admiralty jurisdiction on the district courts, but "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it." (*Larson vs. Alaska Steamship Co.*, 96 Wash. 665.) The question then is, as we have stated, whether the plaintiff in error could have maintained an action in admiralty for the injuries alleged in the complaint. It is our contention that such an action could not have been maintained because the service in which the plaintiff in error was engaged was clearly non-maritime.

In putting forth this contention, we rely upon the decision of this court in *Campbell vs. Hackfeldt, supra*. That was an appeal from the District Court of Hawaii, which sustained an exception to a libel for want of jurisdiction. The libelant, a stevedore, sued in admiralty for injuries sustained in connection with the unloading of cargo. The injuries were not caused by any fault of the ship, its officers, or owner, but were alleged to have been caused by the carelessness of the stevedore's employer, a corporation engaged in loading and unloading ships at Honolulu. The District Court dismissed the libel for want of jurisdiction on the ground that the service was non-maritime and this court, on appeal, sustained that decision. Among other things, this court said:

“The fundamental principle underlying all cases of tort, as well as contract, is that, to bring a case within the jurisdiction of a court of admiralty, maritime relations of some sort must exist, for the all-sufficient reason that the admiralty does not concern itself with non-maritime affairs (p. 697).

“Torts, as well as contracts, not maritime, are outside of admiralty cognizance (p. 697).

* * * *

“In the case of torts, locality remains the test. for the manifest reason that, to give an admiralty court jurisdiction, they must occur in a place where the law maritime prevails. But

this is by no means saying that a tort or injury in no way connected with any vessel, or its owner, officers, or crew, although occurring in such a place or territory, is for that reason within the jurisdiction of the admiralty. On the contrary, it is, as has been seen, only of maritime contracts, maritime torts, and maritime injuries of which the United States courts are given admiralty jurisdiction. These views are not in conflict with any decision brought to our notice, or that we have been able to find" (p. 700.)

In rendering that opinion, this court quoted with approval from an English case, in part as follows:

" * * * You have to consider three things—the locality, the subject-matter of complaint, and the person with regard to whom the complaint is made. You must consider all these things in determining whether the admiralty court has jurisdiction" (p. 700).

In the Campbell decision this court analyzed the general language used in many of the cases to the effect that in tort jurisdiction of admiralty depends on locality, and it was clearly pointed out that none of these decisions, properly considered, could be construed as holding that locality and locality alone is the test in tort cases. The test of locality must, it is true, be met, but the tort must also be maritime in character.

It has been thought by some that the decision in the *Campbell* case has been weakened by the later decisions of the Supreme Court of the United States in *Atlantic Transport Co. vs. Imbrovek, supra*, and *S. P. Co. vs. Jensen, supra*. When, however, those decisions are examined, it will be found that, instead of in overruling the *Campbell* decision they really approve the rule of law therein decided.

Let us re-state what was held by this court in the *Campbell* case. The general rule was announced that, a tort to be maritime must (a) occur upon navigable water, and (b) must be related to commerce and the navigation. Applying those tests to the facts before it, the court in the *Campbell* case held that a stevedore injured under the circumstances stated was not within the rule, because, although the rule was met so far as locality was concerned, it was not met so far as the nature of the service was involved. In other words, in the *Campbell* case it was held that a stevedore employed as the libelant in that case was employed was not engaged in the performance of a maritime service.

In *Atlantic Transport Co. vs. Imbrovek, supra*, the Supreme Court of the United States was called upon to consider to what extent an injury to a

stevedore might be within the admiralty jurisdiction. The libelant in that case was a stevedore employed in loading a ship which was actually employed in commerce and navigation. In holding that this stevedore could sue in admiralty for an injury sustained in the course of his employment, the court, after referring to the numerous cases stating that locality is a test of admiralty jurisdiction in cases of tort, then went on to say that if there was a further test to be applied, namely, the test of character of service, that further test was also met, for the service in which the stevedore was engaged was in fact of a maritime character. The court said:

“The libelant was injured on a ship, lying in navigable water, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship’s cargo is of this character. * * *”

In the *Imbrovek* decision the Supreme Court did not deny the correctness of the rule of law announced by this court in the *Campbell* case, but only denied its application to a stevedore engaged on a vessel then employed in commerce. This decision of the Supreme Court falls far short of holding that, every tort that occurs on navigable water is of necessity cognizable in admiralty merely

by reference to the test of locality. The *Imbrovek* case, it is clear, leaves the rule of law announced in the *Campbell* case unimpaired and only denies its application to stevedores employed in loading a ship presently employed in commerce and navigation.

In *S. P. Co. vs. Jensen, supra*, the Supreme Court of the United States, following the *Imbrovek* decision and construing the compensation act of New York, held that such act was not applicable to a stevedore injured in connection with work on a vessel engaged in commerce and navigation, because the service was *maritime in its nature* and therefore within the admiralty jurisdiction.

After the decision in the *Jensen* case that provision of the federal judicial code which saves to suitors in admiralty an alternative remedy at common law, was amended by adding thereto a further provision reading as follows:

“And to claimants the rights and remedies under the Workmen’s Compensation Law of any state.”

This additional provision is commonly known as the Johnson Amendment and came to the attention of the Supreme Court in two subsequent decisions, namely, *Peters vs. Veasy*, 251 U. S. 121, 64 L. Ed., and *Knickerbocker Ice Co. vs. Stewart*

(decided May 17, 1917, reported in United States Supreme Court Advance Opinions, issue of June 15, 1920). If there is any doubt as to the exact ground of the decisions in the *Imbrovek* and *Jensen* cases, that doubt is completely dissipated by what the court said in the case of *Peters vs. Veasey*. In that decision the court made it plain that the two prior decisions under discussion were based on the finding that the ordinary work of stevedoring and longshoreing is maritime in character and for that reason within the admiralty jurisdiction. So far as the Johnson Amendment was involved in the *Veasey* case, the court merely held that that amendment had no application to accidents happening before the amendment became effective. In the last decision entitled *Knickerbocker Ice Co. vs. Stewart, supra*, the court was called upon to pass upon the Johnson Amendment and then held that while congress itself might pass a compensation law of uniform application to maritime affairs, it could not constitutionally subject maritime relations to the varying provisions of the compensation acts of the different states.

Considering these various decisions to which we have called attention, two rules are very plainly deducible, first, that where a compensation act exists

as comprehensive as that of the State of Washington, the jurisdiction of courts over non-maritime accidents is completely abolished; and, second, that no state compensation act, however comprehensive it may be, can be construed to abolish the jurisdiction of the courts with respect to torts that are maritime.

It is admitted by the plaintiff in error (brief of plaintiff in error, p. 11) that the decision of this court in *Campbell vs. Hackfeldt* is squarely in point against the contention of plaintiff in error. It is not true, however, as plaintiff's counsel state, that that decision abolishes the test of locality in tort cases. The decision very plainly states that locality is a test, but not the exclusive test. The only authority, if it may be called such, cited in direct opposition to the conclusion reached in the *Campbell* decision is a quotation from the *Harvard Law Review*. That quotation from that periodical was noticed by this court in its opinion in the *Campbell* case, and what was there said by the court sufficiently disposes of the observations of the unknown author of that article.

There is nothing in any of these decisions of the Supreme Court of the United States that impairs in the least the rule of law announced in the

Campbell case, namely, that a tort to be maritime must not only occur on navigable water, but must also have some relation to the operation of a ship engaged in commerce and navigation.

If the rule of the *Campbell* decision is the law it must follow that a watchman employed on an uncompleted hull is not engaged in a maritime service for two reasons more or less closely related. First, because a watchman, even though employed on a completed ship, is not engaged in the maritime service when the ship is not engaged in commerce and navigation, and, second, an uncompleted hull is not an instrumentality of commerce and navigation subject to admiralty jurisdiction, even though afloat.

In *The America*, 56 Fed. 1021, it was held that a watchman employed on a dredge lying in port is not engaged in performing a maritime service. In *The Sirius*, 65 Fed. 226, it was held by Judge Morrow that the service rendered by a watchman employed to care for and clean the machinery and maintain a general care and supervision of a vessel lying at her home port, out of commission and with no voyage in contemplation, is not maritime. In *The Furber*, 157 Fed. 124, it was held that the service rendered to a domestic vessel after she had

been laid up at a wharf for the winter, in pumping her out, attending to her lines, etc., are not those of a mariner and cannot be made the basis of a maritime lien. To the same effect are the opinions in *The Fortuna*, 267 Fed. 573, and *The Sinaloa*, 209 Fed. 287, decisions rendered by district judges of this circuit. It is true that these decisions concern claims sounding in contract and not in tort, but they are nevertheless pertinent, for if the character of the service is material in tort cases, as held in the *Campbell* case, then these cases which decide that watchmen aboard vessels not in active service, do not perform a maritime duty are in point. It must be clear that, if the service of a watchman, aboard a boat temporarily out of commission, is not maritime, the service of a watchman aboard an uncompleted hull, moored to the builder's wharf, can not possibly be maritime, for such work is still further removed from commerce and navigation.

It will be recalled that the complaint in this action affirmatively states that the hull "Cleo," although launched, remained uncompleted. The Supreme Court of the United States in the recent case of *Thames Towboat Co. vs. The Schooner Francis McDonald*, decided December 6, 1920, and reported in the advance opinions of the United

States Supreme Court, issue of January 1, 1921, held that a contract to furnish materials, work and labor for the completion of a vessel made after such vessel was launched, but while not yet sufficiently advanced to discharge the functions for which she was intended, is not within the admiralty and maritime jurisdiction. This decision, it seems to us, is squarely in point. If the hull "Cleo," being an uncompleted vessel, had not yet become an instrumentality of commerce and navigation, so that admiralty jurisdiction could attach to her, in a case of contract, how can it be claimed that the service of a watchman aboard that uncompleted hull is maritime in character so that the admiralty jurisdiction does attach in a case of tort?

A boundary between the admiralty and the common law jurisdiction must be drawn somewhere and the Supreme Court in the case last cited has held that the admiralty jurisdiction does not attach in any event prior to the time that the vessel is so far advanced towards completion as to be able to discharge the functions for which she is intended.

AUTHORITIES CITED BY PLAINTIFF IN ERROR.

In the second subdivision of their brief, counsel for plaintiff in error cited a number of cases to

support their claim that the *Campbell* decision is erroneous.

In *Leathers vs. Blessing* (26 L. Ed. 1192), 15 Otto, 626, the Supreme Court sustained the admiralty jurisdiction in a suit *in personam* brought by a consignee injured through the negligence of a ship and its officers while on board on business connected with the ship. The case is really an authority for our contention, for it recognizes that the jurisdiction in admiralty depended upon the nature of the libelant's business at the time of his injury. If locality was the sole test of jurisdiction it would have been wholly unnecessary for the Supreme Court in that case to inquire whether or not the libelant was aboard the ship in connection with the ship's business as a carrier of commerce. The jurisdiction in admiralty was sustained, for "although the transit of the vessel was completed, she was still a vessel occupied in the business of navigation at the time." There is nothing in this case that lends support to the contention that an uncompleted hull, moored at the dock of the builder, is within the admiralty jurisdiction merely because afloat.

Jervey vs. The Carolina, 66 Fed. 1013, cited in plaintiff's brief, page 12, is but a case stating

the indisputable rule that the courts of admiralty have jurisdiction to determine the right to the possession of vessels engaged in commerce and navigation. There is nothing in this decision holding that an accident aboard an uncompleted hull is a maritime tort.

Tillworth vs. Moore, 4 Fed. 231, is a decision sustaining the admiralty jurisdiction *in personam* in a suit against a ship owner for the abduction of a minor and his maltreatment while aboard. It is not pertinent to the present inquiry.

Anderson vs. E. B. Wood, 38 Fed. 444, concerns an injury to a seaman aboard a ship engaged in commerce and navigation. The facts are not at all similar to those in the case at bar.

The H. S. Pickands, 42 Fed. 239, involved an injury to a person engaged in doing repair work on a vessel lying in winter quarters at a wharf, the injuries being caused by a defect in a ladder from the ship to the wharf. The jurisdiction in admiralty was denied.

The Strabo, 90 Fed. 110, concerned an accident where the injured person was employed in loading a vessel lying at a dock, the negligence being attributable to the ship. This decision discusses at some

length the vexed question as to when admiralty has jurisdiction where the cause has its inception on shipboard but the damage is consummated on land, or *vice versa*. We do not think it is necessary to go into a discussion on this question for the facts involved in the case cited are entirely dissimilar to those at bar.

Steamship Co. vs. Hall Bros., 249 U. S. 119, 63 L. Ed. 510, is a case in which the jurisdiction in admiralty was affirmed in a suit brought *in personam* to recover for repairs made to a ship and the incidental use of marine ways in connection with such repairs. This decision contains nothing bearing on the case at bar, except the general observation that locality is a test of jurisdiction in cases of tort. This is but another repetition of that general observation which was very clearly explained by this court in the *Campbell* decision.

The Hokkai Maru, 171 C. C. A. 353, to which passing reference is made on page 22 of plaintiff's brief, is a very different case. It involved an injury to a person employed aboard a ship then actually engaged in commerce and navigation. It may be admitted that the jurisdiction in such cases is settled beyond dispute, but that by no means establishes that the admiralty jurisdiction extends to injuries

sustained by a watchman aboard an uncompleted hull that never has been engaged in commerce.

MEASURE OF DAMAGES.

In the third subdivision of their brief, counsel for plaintiff in error argue that the plaintiff is entitled to recover full indemnity. It is not clear to us what relation this contention has on this appeal, which does not present any question as to how much the plaintiff is entitled to recover, but only whether he is entitled to recover at all in an action at law.

It certainly would be most inconsistent for us to contend that this tort is non-maritime and then insist that the measure of recovery is limited by a rule applicable only to maritime torts. We make no such contention and if we did make it, it would be wholly beside the question presented on this appeal. We therefore think it unnecessary to follow the argument advanced by counsel for plaintiff in error further than to remark that the rule of full indemnity applicable in admiralty by reason of the unseaworthiness of the vessel can in the nature of things only apply in a case of injury sustained aboard a vessel actually engaged in commerce and navigation. The issue of seaworthiness in the nature

of things can have no application in the case of an uncompleted hull, for to say that the law requires an uncompleted hull to be seaworthy is equivalent to saying that the law requires a vessel to be brought into existence instantaneously.

Even if seaworthiness were a factor in this case, which it is not, nevertheless, the facts stated in the complaint do not amount to unseaworthiness.

Hanrahan vs. Pacific, etc., Co., 262 Fed. 951;
The Santa Barbara, 263 Fed. 369.

In the *Hanrahan* case the court said:

“Seaworthiness is a relative term; a vessel may have that quality in port and yet be wholly unfit for rough water; and to say that this vessel was unseaworthy because she had no handrail up, while lying along side a wharf discharging cargo, is merely untrue.”

So in the case at bar, to say that an uncompleted hull is unseaworthy, merely because some appurtenance has not yet been permanently fastened, amounts to merely a misuse of terms.

The suggestion appearing in several places in the brief filed on behalf of the plaintiff in error to the effect that if this judgment is not reversed, the plaintiff in error will have been left without any

remedy at all, is neither pertinent nor well founded. If the Industrial Insurance Commission of Washington erroneously decided a question of law, that decision is of course not binding on anybody. If the plaintiff in error is entitled to compensation from the state fund, he can enforce that right by suing the commission.

Stertz vs. Industrial Insurance Commission,
91 Wash. 588;

State ex rel. Jarvis vs. Daggett, 87 Wash. 253.

The fact that the plaintiff in error has seen fit to acquiesce in an erroneous ruling made by this administrative board can not be determinative of the jurisdiction of the courts.

We submit, therefore, that this uncompleted hull was not an instrumentality of commerce and navigation; that the plaintiff in error was engaged in a non-maritime service, that the tort, if any tort was committed, was of a non-maritime nature, and therefore, under the repeated rulings of the Supreme Court of Washington, and the federal decisions to which we have called attention, the trial judge was right in holding that there is no juris-

diction in the courts, but that the plaintiff in error must seek his remedy under the compensation act.

Respectfully submitted,

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